Supreme Court, U.S.
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In The
# Supreme Court of the United States
October Term 1997

NANCY PRESCOTT,

*Petitioner*,

v.

G.I.W. INDUSTRIES, INC., and
KSB AMERICA COMPANY,

*Respondents.*

**Petition For a Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

*Worksharing Agreement*

1. When a charge is filed with an EEOC cooperating agency, or individual, must a plenary jurisdictional determination be made, and proper "geographic", or other similar subject matter jurisdiction be shown at the time of filing, to find that the charge is timely filed, or does the mutual agency designation of the EEOC's standard Workshare Agreement create a filing, on receipt of the written, verified charge by the cooperating agency, given the EEOC's statutory authority and mandates.

*Electronic Filing*

2. Is a Title VII charge timely filed with the EEOC, where information from a written and verified charge is converted, as required by the EEOC to digital form, by a cooperating agency's or individual's use of the EEOC national computer, and transmitted and received by the terminal in the D.C. office, a chronologically generated national EEOC case number assigned, and the digital information is digitally "date stamped" as received, within 180 days.

*Equitable Tolling*

3. Review should be granted to reaffirm that district courts must fully and fairly address equitable tolling considerations, so appellate courts are not needlessly involved in decisions where agency action may not be in precise accord with a district court's interpretation of agency action, or related working documents.

## PARTIES TO THE PROCEEDING

The following persons have an interest in the outcome of this case:

Batson, John P. (attorney for plaintiff)
Bell, Charles T., Jr. (EEOC)
Bowen, The Honorable Dudley H., Jr (Judge S.D.Ga.)
Duffy, Robert P., Esq. (EEOC)
G.I.W. Industries, Inc. (defendant/appellee)
Jones, Sheryl, (RCHRC)
KSB America Co. (defendant/ appellee)
Ogletree, Deakins, Nash, Smoak & Stewart (attorneys for defendant)
Prescott, Nancy (plaintiff/appellant)
Reams, Gwendolyn Young, Esq. (EEOC)
Sands, Robert O., Esq. (attorney for defendant)
Snapp, William P., Esq. (EEOC)
Starr, Susan L.P., Esq. (EEOC)
Stewart, C. Gregory, Esq. (EEOC)
Thomas, Frank (RCHRC)
Williams-Kimbrough, Bernice (EEOC)
Wheeler, Carolyn L., Esq. (EEOC)

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## OPINIONS BELOW

The material order of the United States District Court for the Southern District of Georgia ("District Court") granting summary judgment is found in the Appendix ("A.") at A.1-4 (R.1-23), and the District Court's denial of a motion for reconsideration is found at A.5-8. (R.1-34). A timely appeal followed. (R.1-28 & 35).

The decision of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") summarily affirming the District Court is unpublished, and is found at A.9. The Eleventh Circuit denied the petition for rehearing on April 30, 1997. (A.12).

## STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

## STATUTES INVOLVED

The statutes and other legislated provisions are found in the Appendix at 11-18.

Portions of the Constitution, the United States Code, the Code of Federal Regulations and the Ordinance creating the Richmond County Human Relations are included in the Appendix.

## STATEMENT OF THE CASE

### Statement of Facts

The issue is whether a Title VII charge, which was filed within 180 days with an agency which appeared to have authority to treat such charges as timely on receipt of filing was timely filed. A written, verified allegation of facts stating possible discrimination by an employer in an adjoining county, was filed on either the 171st or 174th day[1] at a cooperating agency, the Richmond County Human Relations Commission ("RCHRC"), designated by the EEOC pursuant to 29 C.F.R. §§ 1601.8 and 1601.74(a) as a place where charges may be filed. (R.1-15-Thomas Aff.; Durrette Aff.).

The District Court used the date stamp of 09/28/94 on the paper charge, which had been sent from the RCHRC to the Atlanta EEOC as the filing date. (R.1-23-2). This date was outside 180 days.

The employee asserted the charge should be timely on three grounds: (1) By due deference to longstanding agency interpretation and application of the self-executing, mutual agency designation, in the EEOC Workshare Agreement, and overwhelming case law supporting the EEOC's position regarding the Workshare Agreement on agency designation and self-execution; (2) By date stamp filing of the written, verified charge information, converted todigital form, received in the D.C. terminal of the EEOC nationwide computer system, which computer date-stamped the information as having been received within 180 days; or, (3) The unique facts establishing equitable

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[1] The Plaintiff worked all day on the 25th of March. An argument can be made she was not terminated effectively until March 28th, 1994, therefore the paper charge, which was filed on 9/15/94 with the RCHRC was filed on the 171st or 174th day. (R.1-15 Durrette App. ¶13, Ex. C at 13 logbook).

tolling and this Court's precedent declaring filing not jurisdictional.

The language of the Workshare Agreement which establishes mutual agency and self-execution of filing receipt, for the purposes of the timeliness determination is at Section II. A, which states:

> II. Filing of Charges of Discrimination
>
> A. In order to facilitate the assertion of employment rights, the EEOC and the FEPA each designate the other as its agent for the purpose of receiving and drafting charges.

(R.1-15-Thomas Aff. Ex. A) (A.40). Other considerations in the Workshare Agreement relate to deferral, substantive jurisdiction and administrative, conciliation issues, between the two agencies.

The District Court focused on whether the RCHRC could "accept" the filing, because it found language in the Workshare Agreement which restricted its substantive investigative authority to Richmond County. (R.1-23 & 34) (A.1-4 & 5-9). The District Court's logic was that even though the charge was received within 180 days by the RCHRC, because the employer was in an adjoining county, where there was no state or local law prohibiting discrimination, the RCHRC had no authority to investigate or conciliate and therefore the RCHRC had no "mutual jurisdiction" at the time of the receipt of the filing, and therefore the filing could not be timely with the RCHRC. (See I.A.&B. at A.39&40 "to the extent of common jurisdiction", I.B.). It was this last step in the logic, where no distinction was made between filings and substantive matters relating to jurisdiction.

The District Court determined that the FEPA could not be an agent of the EEOC for filing, deciding that the limitation to mutual jurisdiction in the precatory language was controlling.

(Order, R.1-23-4) (A.4). (Agreement, R.1-15-Thomas Aff., Ex. A) (A.39&40). The two separate portions of the Workshare Agreement, Sections I.A. and II.A., are not on their face, mutually exclusive, because a distinction exists between receipt of the charge and investigation of the charge, at least if one accepts that filing is not jurisdictional. *Zipes v. Transworld Airlines, Inc.*, 455 U.S. 385, 393, 71 L. Ed.2d 234, 243, 102, S.Ct. 1127, 1132 (1982). The District Court chose the interpretation limiting the RCHRC's authority to be an agent of the EEOC for purposes of filing only to Richmond County, where it had authority to investigate and conciliate. (R.1-23) (A.1-5).

However, the creating ordinance of the RCHRC does have language which would authorize the RCHRC to be an agent of the EEOC to "receive" charges without regard to location of an employer. The RCHRC may "receive, initiate, investigate and pass upon complaints alleging discrimination ..." without regard to any connection with Richmond County. (Richmond County Ordinance, passed 01/18/83) (A.19 at Section 14(j)). This was pointed out to the District Court. (R.1-25-Brief of Plaintiff, in support of motion for reconsideration at 4).

By the Workshare Agreement, as interpreted by EEOC and the local FEPA, the RCHRC, and their longstanding practices, both agencies considered the charge timely filed. (R.1-15-Thomas & Durrette Affs.); (R.1-30; ¶20); ) (R.1-32; ¶20; EEOC Dist. Dir. Williams-Kimbrough). By inference, the charge may also be considered timely filed by the agencies because it was not dismissed. Also, the EEOC paid the RCHRC for processing the charge, and it would not have, had the charge been untimely. (R.1-25-Thomas; Inference).

After the 09/15/95 filing no one at the agency took any action to notify the Plaintiff, or her counsel, that the filing was not complete. (R.1-25; Batson Aff.).

After receiving the paper charge, the FEPA, consistent

with EEOC training and practice, entered the charge information into the nationwide EEOC computer on 09/19/95. (R.1-25 Jones; R.1-30 & 32 Column AO date). The information, in digitized form, of the written, verified charge, was received by the EEOC computer terminal in Washington, D.C., on 09/19/95, within the 180 days. (Kimbrough Aff., Ex. A, Column 10) (A.20-24).[2] The EEOC computer assigned a national, chronological number and effectively date-stamped the receipt by storing memory of the transaction in the hard drive to make printouts, such as Exhibit A. (*Id.*) The RCHRC employee in Augusta put the EEOC number from the EEOC computer on the charge, as she averred it was her handwriting on 9/19/95, the date of the computer transmission. (R.1-15-Durrette Aff., ¶6, re. Ex. B). The electronic filing was transmitted to the Atlanta office, which acknowledged receipt of the digital information of the charges on 09/23/95. The paper charge was mailed to Atlanta and received 09/28/95; although the contract and Agreement requires that charges be forwarded from the RCHRC within two days of receipt, which occurred on 09/15/95. (R.1-15 Thomas Aff. Ex. A, II.E.; A.41).

Course of Proceedings

The complaint generally pleaded the condition precedent that "[j]urisdiction is ... based upon a charge timely filed with the EEOC and Richmond County Human Relations Commission." (R.1-1-1 ¶3). The answer (without the specificity and particularity referenced in Fed.R.Civ.P. 9(c), and which would later emerge in the Employer's response in their motion for summary judgment) stated, "the plaintiff failed to comply with the procedural prerequisites under Title VII...". (R.1-5-2, Second Defense).

When the Employer filed its summary judgment and

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[2] The Kimbrough Affidavit in ¶17 references the "ninth column" and the "AO date", but the AO date is in the tenth column. (A.24).

statement of undisputed material facts, it argued that the paper charge, date-stamped 09/28 by the EEOC, was not timely filed and that plaintiff was represented by counsel. (R.1-12-2). The Employer also asserted, "[t]here is no state or local agency in Georgia with jurisdiction to grant or seek relief for employment discrimination occurring in Columbia County, Georgia". (*Id.* ¶ 13). There was no language disputing the longstanding apparent agency or the FEPA designation in the C.F.R. § 1601.74.

There is nothing about what the lawyer failed to do.

In a footnote, in their opening memo, Defendant stated "...this filing was a nullity since plaintiff was not employed in Richmond County." (R.1-11-5 n.4).

Plaintiff put forward facts that the filing had been made only with RCHRC, and facts about the RCHRC and the Worksharing Agreement. (R.1-15). Title 29 C.F.R. § 1601.74 lists the RCHRC as an agency which can accept charges as a designated representative and 29 C.F.R. § 1601.8 states that charges can be filed with "designated representatives" of the EEOC. (A.14&17). The Workshare Agreement, and the actions of the RCHRC makes the RCHRC an apparent agent of the EEOC, was also argued. 29 C.F.R. § 1601.13(c) Agreements; 29 C.F.R. § 1601.74 Designated agencies. (R.1-15-#10) (A.17&18).

Plaintiff asserted deference to the EEOC's longstanding interpretation and application of the Workshare Agreement, by which the two agencies considered one another mutual agents for receiving charges. RCHRC Director Thomas believed a Worksharing Agreement had been in effect "since approximately 1982". (R.1-15-Thomas ¶10). Thomas considered the filing timely. (*Id.* ¶9).

Once filed, the agencies could make plenary jurisdiction and administrative decisions, about which agency had jurisdiction and authority, or obligation, to begin the conciliation process, or take substantive action, without fear of

missing deadlines. (R.1-14&15-Thomas, RCHRC Director and Clerk, Ms. Durrette Affs.).

As to the beginnings of the electronic filing theory, the Affidavit of RCHRC intake worker, Ms. Durrette, referred to logging the EEOC number in the RCHRC log book, after the, EEOC terminal in Washington, D.C. had received computer notice of the charge, by inference, and then wrote the EEOC number, for the received charge, in the log book and on the charge. (R.1-15-Durrette ¶13; Inference). A few days before the 28th of September Ms. Durrette mailed the paper charge to Atlanta.

Plaintiff argued actual agency based on the reciprocal agency language of the Agreement (See R.1-15-Thomas Aff. Ex. A at ii[II]), and based upon a history of receiving such charges, the RCHRC being paid to do so, and the EEOC considering them timely filed; even for out of county employers. (R.1-14-7).

Plaintiff cited *Williams v. Washington Metro Area Transit Auth.*, 721 F.2d 1412 (D.C. Cir. 1983) and perfected the legal basis to require a review of the evidence for equitable tolling. (R.1-14-2 Plaintiff's Brief in opp. to sum. judgment). The Defendants did not assert as a material fact or law that Plaintiff was not entitled to tolling. (R.1-12). Defendants stated plaintiff had been represented by a lawyer, but they had not articulated any act which when informed, the lawyer had not completed. (*Id.*). The Defendants offered no evidence of prejudice. (*Id.*).

When Defendants responded to Plaintiff's response, the Defendants specifically stated the nature of this geographical, jurisdiction argument. (R.1-19). They stated that Plaintiff had to prove the authority of the RCHRC to enter into any Agreement with the EEOC. (R.1-19-4).

In Plaintiff's brief in support of the motion for reconsideration Plaintiff argued that the Ordinance does give RCHRC authority to "receive" charges regardless of the county

of the employer. (Ordinance R.1-25-4) (A.19 Section 14(j)).

The District Court issued its Order granting the employer's motion for summary judgment, finding, in verbage only:

> This requirement of filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite, but instead, it is in the nature of a statute of limitations. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1981) [sic].

(R.1-23-2). The District Court did not mention the tolling consideration of *Zipes* in its recitation of the law. Although the District Court cited the case, it disregarded the principle that EEOC filings were not jurisdictional, and ruled exactly as if they were.

The District Court analyzed the two sides of the Agreements' interpretation, with no reference to EEOC's need to cooperate with other agencies. (R.1-23).

The District Court's first order is devoid of any consideration of equitable tolling based on the undisputed if not overwhelming evidence of apparent agency. (R.1-23).

The Plaintiff then filed a motion to reconsider and for new trial. (R.1-28). Plaintiff filed further evidence to expand on the EEOC computer based filing, and receipt of the digitized charge by the central computer in Washington D.C. The RCHRC believed the charge was timely. The EEOC computer system, had been in place since 1994. (R.1-25-Jones). The EEOC system received the information and then issued a number for a charge received on 09/19/94. (R.1-25-Jones Aff.). By inference had the EEOC computer not received the charge on that date, an EEOC number would not have been issued, because computers operate on linear, mathematical logic - when operating.

The EEOC computer in the RCHRC office is one reason

the RCHRC appeared to have EEOC authority. The RCHRC received charges for the EEOC, and then, through the EEOC computer system, filed them, and then in paper form, mailed proof of the computer filing to Atlanta, without concern for getting the paper charge to Atlanta before the deadline date; which had been noted in the log. (R.1-15-Durrette Aff. & Thomas Aff. Ex. C Dual Date). This also explains, by inference, why Plaintiff's counsel was not notified of a timeliness or jurisdiction problem. (R.1-25-Batson).

In the reconsideration the Plaintiff argued *Brown v. Crow*, 963, F.2d 895 (6th Cir. 1992)(deferral agency mistake in applying Workshare Agreement not held against claimant) (R.1-24-4&5), and submitted declarations relating to further details of equitable tolling. (R.1-25-4).

The Plaintiff argued that Due Process and Equal Protection required that the EEOC be a party to this litigation. (R.1-24-4).

Plaintiff and the EEOC filed further support for the apparent agency that EEOC and RCHRC considered the RCHRC 9/15/94 filing as "EEOC received"; regarding the Workshare designation, self-execution of filing theory; as well as evidence that the EEOC computer had received the filing on 09/19/94. (R.1-29&30;32).

The District Court denied reconsideration. There is no consideration of the electronic filing in the Reconsideration Order. (R.1-34) (A.5-9). There is no discussion of the EEOC, RCHRC, or counsel's affidavits with respect to tolling, notwithstanding citing *Brown v. Crow*, *supra.*, and the District Court's citing of *Zipes*. Although the District Court cited *Zipes*, and referenced a factor relevant to a portion of the principle of equitable tolling. The District Court concluded:

> There is no doubt that the result is harsh to a plaintiff who would have little reason to know the details of an inter-agency agreement. However, a harsh result cannot be used as the

> excuse to dismantle the law in a result-oriented quest for subjective fairness.

(R.1-34-4). The District Court recognized the manifest injustice of not allowing tolling in this case, even though it was unwilling to consider the case law, which made this relevant. The District Court held firm to its singular contract interpretation, disregarding the public purpose of EEOC. The District Court characterized the reconsideration as "predicated on essentially the same argument previously advanced", mutual agency designation for receiving filings, and denied the motion. (R.1-34-3). The Order did not address the electronic filing issue.

On appeal to the Eleventh Circuit the Plaintiff raised the following issues: (1) Worksharing Agreement interpretation and application; (2) Electronic Transfer; (3) Equitable Tolling; and, (4) Whether the District Court abused its discretion in not considering the evidence submitted in reconsideration. The EEOC submitted an *amicus* brief, selected portions of which are at A.25-36. The EEOC argued its interpretation and application of its Workshare Agreement, and that the agency's position should have received deference. (A.28-33). Tolling or equity and electronic filing arguments were also asserted. (A.35&36) (A.36&37).

The panel of the Eleventh Circuit on February 26, 1997, found as follows:

> We agree with the district court for the reasons stated in its dispositive orders ...[dates]...that appellant's claim is time barred. In addition, we find no abuse of discretion in the district court's denial of appellant's motion for reconsideration....

The plaintiff filed a motion for reconsideration which was also summarily denied on April 30, 1997. (A.10). This petition followed.

## REASONS FOR GRANTING THE WRIT

### *Worksharing Agreement*

1. When a charge is filed with an EEOC cooperating agency, or individual, must a plenary jurisdictional determination be made, and proper "geographic", or other similar subject matter jurisdiction be shown at the time of filing, to find that the charge is timely filed, or does the mutual agency designation of the EEOC's standard Workshare Agreement create a filing, on receipt of the written, verified charge by the cooperating agency, given the EEOC's statutory authority and mandates.

This appeal is occasioned by the District Court's erroneous reading or application of the Workshare Agreement. (Order R.1-23) (A.1-5). The District Court chose the Employer's interpretation of the Workshare Agreement, which created a geographic jurisdiction requirement which requires reference to evidence beyond the face of the charge, when the charge is filed or received, and timeliness determined. The District Court added a geographic jurisdiction element to the timeliness of the filing determination. (A. 3&4).

In taking this course of action the District Court jeopardized the simultaneous filing mechanism of Workshare Agreements used by 118 of the agencies listed in 29 C.F.R. §1601.74. (*See e.g.*, A.17-18 for small portion of places where to file a charge).

To reach this position, which flies in the face of the principle of *Zipes v. Transworld Airlines*, 455 U.S. 385 (1982), that EEOC filings are not jurisdictional, the District Court also disregarded the principle of deference to agency interpretation. Where the agency's interpretation, or action, is reasonable, in relation to its statutory authority and mandates, agency position should receive deference from the court, and be accepted. *Smiley v. Citibank (South Dakota), N.A.*, __ U.S.__, 116 S.Ct.

1730, 1733 (1996), (citing *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845, 104 S.Ct. 2778, 2781-2783, 81 L. Ed.2d 694 (1984). Even if an argument can be made for a different interpretation, if reasonable, the agency's position should prevail. A Workshare Agreement had been used in the manner suggested by the agencies since the early 1980's. (R.1-25 Director RCHRC, Thomas Aff.). RCHRC employees were trained by the EEOC that receipt by RCHRC was a timely filing. (*Id.*). The EEOC designated the RCHRC as an FEPA where a charge could be filed by making this relationship formal, and published in the Code of Federal Regulations. 29 C.F.R. § 1601.8 & § 1601.74. (A.14 17 & 18). There are no footnotes in the C.F.R. setting limitations of the RCHRC's FEPA authority, like that of the Austin (Tx) Human Relations Commission listing. (A.17&18). (See also, EEOC Brief at A.29,n.7, arguing that the RCHRC is a "deferral" agency, proving that confusion abounds). In the District Court the EEOC filed the Affidavit of the District Director who affirmed the mutual agency designation of the Workshare Agreement. (R.1-30-3&4; 32-3&4).

The language in the Workshare Agreement, of mutual agency designation, can appear to appoint the RCHRC as a agent for receipt of filings, given Section 14 (j) of the RCHRC Ordinance, which allows such activity without regard to any authority for action within Richmond County. (A.19).

The RCHRC appeared to act for the EEOC and there was no notice to Plaintiff or her attorney that the deadline would not be met with the filing. (R.1-25 Batson). The existing law at the time was that Title VII agency filings are not jurisdiction matters. *Zipes*, *supra*.

In response to the motion for summary judgment the Plaintiff argued that "each [agency] designate[s] the other" pursuant to the Workshare Agreement. (R.1-14-3&4). In the reconsideration Plaintiff cited *Brown v. Crow*, 963 F.2d 895, 900 (6th Cir. 1992), which also references in n.2 at 877 cases

discussing the "self-executing" terms of agreements. (R.1-25-3). Authority from the circuits support the self-executing language by the mutual designation. *Ford v. Bernard Fineson Development Center*, 81 F.3d 304 (2nd Cir. 1996); *EEOC v. Superior Temporary Services, Inc.*, 56 F.3d 441 (2nd Cir. 1996); *Petrelle v. Weirton Steel Corp.*, 953 F.2d 148 (4th Cir. __); *See also, Reynolds Metal Co. v Rumsfield*, 564 F.2d 663 (4th Cir 1977) (government contractor brought action challenging memo of understanding between DOL contract company and EEOC); *Griffin v. City of Dallas*, 26 F.3d 610 (5th Cir. 1994) (as agent of TCHR under workshare, charge filed with EEOC simultaneously); *Marlowe v. Bottarelli*, 938 F.2d 807, *cert. denied* (7th Cir.1991); *Sofferin v. American Airlines*, 922 F.2d 552, on remand, 785 F. Supp. 780 (7th Cir. 1991); *Hong v. Children's Memorial Hosp.*, 936 F.2d 967, appeal after remand, 993 F.2d 1257, *cert. denied*, 114 S.Ct 2695, 129 L.Ed.2d 826 (7th Cir. 1991); *Worthington v. Union Pacific*, 948 F.2d 477 (8th Cir 1991). The writ should be granted to square the ruling herein with those of other jurisdictions, which reasonably address the practical administrative aspects of EEOC timeliness issues, as resolved by the longstanding interpretations Workshare Agreement's mutual agency designations, contrary to rulings in the Courts below.

The adequacy of the charge at filing is based on minimal requirements, and proof of disputed facts, including facts relating to Title VII subject matter, should be reserved for trial. *See e.g., EEOC v. Shell Oil Co.*, 466 U.S. 54, 80 L.Ed.2d 41, 104 S.Ct 1621 (1984). The proceedings before the EEOC are supplemental to state proceedings and judicial remedies, and therefore, a charge ought not have to demonstrate judicial factors of geographic of jurisdiction when timeliness should be determined as of the time of filing by the filing. *See e.g., New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 100 S.Ct. 2024, 64 LEd.2d. 723 (1980).

When Congress created Title VII it established a

nationwide agency, to investigate and conciliate claims of discrimination. In determining what action would trigger the agency to act, or protect rights in case conciliation should fail, Congress refers to the filing of charges. 42 U.S.C. § 2000e-5(b), *et seq.* Congress did not specifically define what a charge needed to contain, or include, in the Definition section. *See,* 42 U.S.C. § 2000e [§ 701]. The statute does not require a demonstration of geographic jurisdiction at the time of filing, within the, or of the, "cooperating private agency or individual." Such agencies or persons have no self-evident "jurisdiction", yet Congress authorized the use of private agencies and individuals, in cooperation with the EEOC to carry out its mission more efficiently. 42 U.S.C. § 2000e-4(g)(1). (A. 11&12). The "charge" is notice to the agency to stop the running of the 180 day period and to make the administrative wheels start turning efficiently.

Congress realized the charge was a document which would be used to implement a law providing a cooperative conciliation process between parties. Field offices nearby, but not within the jurisdiction, could conceivably service more than one state in the conciliation process. It was not necessary to show, or make geographic jurisdiction, determinations for filing purposes. The agency could take its "conciliation court", as it were, to the parties, after receiving notice to act. Filing could occur, and EEOC timeliness set, and then plenary and administrative decisions made. If a state agency should process the charge, it would be sent to the agency, but deemed already received by the EEOC. *See,* 29 C.F.R. § 1601.13 Filing; deferrals to state agencies.

Congress gave the EEOC broad latitude to set the appropriate substance of charges, in that a charge "shall contain such information...as the Commission requires." 42 U.S.C. § 2000e-5 [§ 706](b)(A.12). The name and address of the employer is necessary so the employer can receive notice of the charge, but the Commission has never required a "geographic

jurisdiction" determination to toll the running of the 180 days and begin the beginning of the conciliation process. 29 C.F.R.§1601.12. Further, as is addressed in Reason 2 below, the EEOC was given the same expansive authority to determine the "form" of the charge, as it was in its selection of agents. *Id.* The EEOC was given the power to set up offices where necessary; where one would think they could independently contract with cooperating individuals. 42-U.S.C. §2000e-4(f). At these offices, the EEOC may "exercise any or all its powers at any place." *Id.*

The EEOC's Agreement, or practiced interpretation of the Agreement is reasonable, and should receive deference. *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115, 108 S.Ct 1666, 1671, 100 L.Ed.2d 96 (1988); *Zipes v. Transworld Airlines*, 455 U.S. 385 (1982); *Love v. Pullman*, 404 U.S. 522 (1972). The source for guidance in interpreting the Agreement is not general, or state law on contract interpretation. Each party herein could make a case for using various common law principles of interpretation to support their respective positions. Plaintiff could argue that the precatory language in Section I, limiting conciliation jurisdiction, does not limit agency authority to receive charges in Section II. These contract interpretation principles are wholly irrelevant to Congressional concerns of establishing an efficient EEOC, which has to defer to and cooperate with state agencies. (See pages 11-18 Brief of EEOC as *amicus*). (A. 28-36). The source for interpretation of this working agency document, which implements a federal procedure for protection against job discrimination, is in the focus of cooperation between the EEOC and other entities recognized in the statute. The mutual designation of agency for receipt of charges is reasonable on the face of the Agreement, based on a distinction between "receiving", and "investigating" or "conciliating". Given agency application, it is even more reasonable, requiring deference. *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115,

108 S.Ct 1666, 1671, 100 L.Ed.2d 96 (1988). The two agencies herein have operated under the belief that they were mutual agents for receiving such charges in a timely manner since the early 1980's. (R.1-25-Thomas Aff.). The EEOC held the RCHRC out to the public as a place where one could make a charge. 29 C.F.R. § 1601.8 and § 1601.74.

The statute does not prohibit the interpretation sought by the Agency, and the challenged practice is not unreasonable, and it should be upheld. *Love v. Pullman*, 404 U.S. 522 (1972). The "statute guards against... proceedings that are difficult to commence, not against ones that are easily commenced." *Love v. Pullman*, 404 U.S. 522, 525-26 n. 6 (1972). Adding a geographical jurisdiction component to the timeliness issue, when every charge could be filed in the D.C. office is contrary to the will of Congress.

This Court must grant the writ to protect the statute and the EEOC's Workshare Agreements from a judicial interpretation which makes the EEOC inefficient.

*Electronic Filing*

2. Is a Title VII charge timely filed with the EEOC, where information from a written and verified charge is converted, as required by the EEOC to digital form, by a cooperating agency's or individual's use of the EEOC national computer, and transmitted and received by the terminal in the D.C. office, a chronologically generated national EEOC case number assigned, and the digital information is digitally "date stamped" as received, within 180 days.

If the first issue is decided favorably for the Title VII claimant, this issue need not be reached. On the other hand, as far as the EEOC is concerned, if the state and local agencies cannot be mutual agents by the language of the Workshare Agreements, then this issue of first impression takes on importance or monumental proportions, in the real world of timely filings, and having to get documents back and forth from EEOC and cooperating and deferral agencies. If computerized transmission of information about facts which are readily verifiable, in the case of Title VII, that a verified, written charge existed prior to the entry of the digital information into the national computer system, cannot occur, there will be untold millions spent meeting deadlines; which could be easily managed and administered, if the Court is willing accept that the Commission, by its statutory authority, may require that the form of the information be digitized by the use of the national EEOC computer.

The EEOC has already invested training time and money in the system and counts on it for its daily operation. The RCHRC has had the system since about 1994. (R.1-25-Jones Aff. ¶5 ).

As a reflection on why the RCHRC took more than two days to send the charge filed with it, to the Atlanta office, where the Workshare Agreement proscribes such a period, (R.1-15-Thomas Aff., Ex. A, §II.E.; A. 41), one need only consider the

advantage the computer offers in conveying information and meeting deadlines. When the charge was brought into the RCHRC, the deadline was noted in the log book. (See log book attached to Durrette Aff., R.1-15) and the dual filing date deadline calculated and listed from the date on the charge as the date of termination. Once the information about the charge was entered, and the EEOC number assigned, the deadline had been met and the rush was over. There was no need to inform the Plaintiff that she needed to file with Atlanta before the 180th day because there was no geographic jurisdiction in Richmond County. Timely filings, by use of the computer, with the information in digitized form, as required by the EEOC, of the written verified charge, can be received and an objective record of receipt maintained efficiently. The result is greater efficiency than the hurried delivery of paper charges. The interest of all will be better served if the Court gives legal sustenance to the receipt of digitized information.

As the population and number of filings increase, the cost of administering just the intake process of receiving filings increases. It will become more important for the efficient and economical operation of the EEOC to rely on computerized filings from written documents elsewhere.

The only case law is related by broad analogy. Charges which are defective may be amended, and the added information relates back to the original date of filing. *Peterson v. City of Wichita, Kansas*, 888 F.2d 1307 (10th Cir. 1989)(subsequently verified charge may meet filing requirements). Even if the paper charge is not sufficient, it can still be "filed" on receipt, and amended later. There is no suggestion that the paper charge can be eliminated, as the statute would seem to prohibit it, the question here is whether the EEOC can use agents to verify that charges exist, and then track and deal with the charges in a modern way, which promotes efficiency.

The EEOC has already decided that the computer is a reasonable means by which to operate, and the Court should

give it deference, because the statute does not compel otherwise, and in fact, gives discretion to the agency to require the information to be put in one form or another. *Love v. Pullman*, 404 U.S. 522 (1972); *E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107, 108 S.Ct. 1666 (1988). The Act says that "Charges shall be in writing... and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). The Act does not say that "only the Commission proper" can receive paper filings. If it suits the Commission to use a digitized form of evidence of receipt of written, verified charges Congress has said that should be the end of discussion. To enable the Commission to better utilize "other agencies, both public and private, and individuals", 42 U.S.C. § 2000e-4(g)(1), "to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with...the Act" the Commission needs to be able to use digitized forms of information. 42 U.S.C. § 2000e-4(g)(3).

This Court approved oral notice of a charge between cooperating agencies, because the Act did not prohibit oral notice. *Love v. Pullman*, 404 U.S. 522 (1972). Oral notice is ephemeral and subject to dispute - as opposed to a computer's capacity to memorialize transactions and dates. To fairly protect the efficiency and integrity of the process brought about by the EEOC national computer system, the decision of the panel should be reversed, and the matter remanded for a trial with full EEOC participation on the issue of electronic filing.

This may be a case of first impression on whether computerized receipt of information from a written verified charge is evidence of a "filing", but the technology need not make it complex. Given the fact that it is undisputed that there is a written, verified charge, then the only question is when has it been filed with the EEOC. See Reason 1 above. The issue is whether a computerized dating of receipt is entitled to the same legal significance as the traditional date stamp; as found its way upon the plaintiff's charge after the paper charge eventually

made its way to the Atlanta office, after the case had been logged into the EEOC national computer, digitized information about the substance of the charge transmitted and received by the EEOC's central terminal, an EEOC case number assigned and a digital date stamp placed in the memory of the computer for 9/19/95 for easy conversion to hard-copy from now until.... There is no good reason not to use the computerized date stamp from the D.C. office as the equivalent of a less modern form of stamp, whether hand stamp or time clock.

To prove timely filing the statute does not require proof that some person at the EEOC has received and is aware of the anything about a particular charge in order to consider it timely filed. Traditionally the date stamp is all that is needed, and who put it on, or what the particular civil servant makes of the charge on the merits is of no moment.

The statute requires that the information about the charge be written and verified, and it requires filing. Receipt by the computer is no different for timeliness determinations than the old method, in particular a time clock. An EEOC office, like a court, could have a time clock, and when a claimant comes in, with a written, verified charge, the claimant could clock it in, with date and time, and then throw it in a basket for later processing; such as assigning a case number, figuring out who has jurisdiction and other matters of substance and jurisdiction as between agencies.

In this case, the computer can do what a time clock can do and more, because it can record that not only that something has been filed, but information which the agency deems important in efficiently processing charges.

This is a matter of great importance. As the case stands now, one could argue that the District Court and the Eleventh Circuit rejected the use of computerized information over the suggestions of the brief filed by the EEOC in the Eleventh Circuit. (A.25-38). Although the specific ramifications of this case cannot be precisely predicted, it is obvious that for the

future, the EEOC must be able to rely on digitized transfers of information in order to operate efficiently and meet its Congressionally charged role of "cooperation" with other agencies. 42 U.S.C. § 2000e.

*Equitable Tolling*

3. Review should be granted to reaffirm that district courts must fully and fairly address equitable tolling considerations, so appellate courts are not needlessly involved in decisions where agency action may not be in precise accord with a district court's interpretation of agency action, or related working documents.

If the District Court had actually followed the principle that timeliness questions are not jurisdictional, and are therefore subject to equitable tolling, this Court would not be faced with the other issues raised in this petition.

Even though the District Court cited *"Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1981)" (sic) (R.1-23-2)(A.2), the District Court did not complete a tolling analysis, applying the history of facts which led to the filing in this case. (See Order A.1-4). The District Court applied the opposite of equitable tolling — like it added geographic jurisdiction to the filing timeliness issue; disregarded agency principle, that an agent has the authority of the principal for the act in question; and, used principles of contract interpretation to determine the significance of slightly conflicting language in an EEOC Workshare Agreement. This conflict alone, using any interpretation, should have meant that filing agency is separate and distinct from investigative agency, and both can co-exist in one document; or the conflict should have allowed extrinsic evidence, which also should have solved the problem.

The District Court's acknowledgment that:

> a plaintiff would have little reason to know the details of an interagency agreement. However, a harsh result cannot be used as the excuse to dismantle the law in a result- oriented quest for subjective fairness.

cries out for an examination of tolling evidence (R.1-35-4)(A.7). Plaintiff's arguments directly confronted the need for

tolling, when the Agencies' interpretation led to filing difficulties. Plaintiff cited *Williams v. Washington Metro. Area Transit Auth.*, 721 F.2d 1412 (D.C. Cir. 1983) in the Brief in response to the motion for summary judgment (R.1-14-2), and in the motion for reconsideration, she cited *Brown v. Crow*, 963 F.2d 895, 900 (6th Cir. 1992) (deferral agency mistake in applying Workshare Agreement not held against claimant). (R.1-25-3) Equitable tolling was also raised on appeal. (Brief of Appellant filed 9/13/96). The EEOC, in its *amicus* Brief at 19 & 20, argued that equity demanded "that the charge be considered filed with the EEOC once it was received by the RCHRC", citing relevant authority. (A.35 & 36).

The defendant made no showing of prejudice. As required in *Love*, *supra.*, 404 U.S. at 526.

The District Court gave no consideration of any factor to defeat tolling, other than its adherence to its view of the law, which rewrote longstanding agency interpretation of a working document, in the face of Supreme Court precedent to the contrary.

The sole argument made by the Employer insisting that tolling was inappropriate, was the fact that Plaintiff was represented by a lawyer at the time of filing. (R.1-19-5). This argument was not addressed by the District Court, as its ruling was firmly planted in its contract interpretation of the Workshare Agreement, with no consideration of the statutorily required functions of the EEOC in relationship to other agencies and cooperating parties, and least of all the claimant.

The first notice, actual or constructive, the lawyer had that the Workshare Agreement was not self executing as to agency and timely filing, or that the RCHRC was not a place where charges could be filed, contrary to what was listed in 29 C.F.R. §1601.8(A.14) and § 1601.74(a), was the Court's contested Order. (R.1-23)(A.1-4). There are no limiting footnotes in the C.F.R. as to the RCHRC's "jurisdiction" for receiving charges, as a place where charges can be filed; as is

the case with the "footnoted" Austin (TX) Human Relations Commission, which notes that for certain charges it is a "Notice Agency." 29 C.F.R. § 1601.74(a)(A.17&18).

The existence of the "Notice Agency" designation, 29 C.F.R. § 1601.74(b), leads one to the conclusion that the EEOC has given serious thought to cooperating with other agencies to establish these relationships of self-executing, designated agency for purposes of filing. It was more appropriate that the RCHRC would be a Notice agency, for out of County cases and that its "footnote" should read, that "for any employment charge of gender or race, where the employer is outside of Richmond County, the RCHRC is a Notice Agency only." Nonetheless, if the EEOC had papered its trail completely on the issue, it would have reached the same position it did in its Workshare Agreement.

The Plaintiff could show that the RCHRC had operated as if it were an agent of the EEOC for purposes of timely filings since about 1982. (R.1-15-Thomas Aff.).

Further, the Ordinance gives the RCHRC authority to "receive" charges without respect to the location of the employer, therefore even using the District Court's geographic jurisdiction logic, the RCHRC had authority to receive filings, and then begin administrative and plenary jurisdiction decisions regarding conciliation and investigation. Ordinance, Sec. 14(j). (A.19).

The record showed that even if a lawyer were involved, or because a lawyer were involved, tolling was appropriate. The Code of Federal Regulations lists the places where charges may be filed, including the EEOC's D.C. office, the field offices listed in §1610.4 (many outside Georgia), or "with any designated representative of the Commission." 29 C.F.R. §1601.8. The "Designated and notice agencies" are listed in 29 C.F.R. §1601.74. There are 118 of them. Most of them are not limited in their authority by any footnotes.

This Court has not held that mere involvement of a

lawyer bars tolling. This is different from a situation where a lawyer is notified that a first filing was made at the wrong agency and then a subsequent filing made at the wrong agency. This spring the Tenth Circuit issued such a ruling in a case involving the strict notice procedures of the Federal Torts Claims Act in *Hart v. U.S.A.*, Spring 1997 (10th Cir. No. 96-5152). Note also that *Hart* involves a claim against the sovereign, where waiver is strictly construed, but this action involves two private parties, on a matter of public concern, involving a statute with remedial purpose.

True enough, though neither Columbia County nor Georgia have a fair employment law,[3] the filing is not jurisdictional according to *Zipes*, and it was more prudent to accomplish filing in person, than to send the charge through the mail; where the local agency had for years, treated filings with the RCHRC, as timely received for the EEOC.

The Plaintiff also argued that due process and equal protection required that the EEOC participate in the proceedings at the District Court. (R.1-25-4; Plaintiff's Brief in Support of Motion for Reconsideration).

Summary judgment should not have been granted to the Defendant, where reasonable inferences of tolling were in the record. The Defendant did not show there were no material facts in dispute as to proof of equitable tolling. On this record, equitable tolling should have been found, and upset of important agency matters of efficient administration avoided. Review should be granted to avoid further problems of failure of deference.

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[3] But see, EEOC, Brief of *amicus* (A.29 n..7 ), which argues that because RCHRC is listed in §1601.74 it is a deferral agency, and therefore the 300 day period should apply.

## CONCLUSION

For the reasons stated the petition for the writ of certiorari should be granted.

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Supreme Court, U.S.
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In The
# Supreme Court of the United States
October Term 1997

NANCY PRESCOTT,

*Petitioner*,

v.

G.I.W. INDUSTRIES, INC., and
KSB AMERICA COMPANY,

*Respondents.*

**Petition For a Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Eleventh Circuit**

## APPENDIX TO CERTIORARI PETITION

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF GEORGIA**
**AUGUSTA DIVISION**
**CIVIL ACTION NO. CV 195-44**

| | |
|---|---|
| NANCY PRESCOTT, | * |
| Plaintiff, | * |
| | * |
| v. | * |
| | * |
| G.I.W. INDUSTRIES, INC, and | * |
| KSB AMERICA COMPANY, | * |
| Defendants. | * |
| | * |

## ORDER

Before the Court is Defendants' Motion for Summary Judgment in this action brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. Defendants allege Plaintiff Nancy Prescott failed to satisfy the statutory prerequisites to suit under Title VII and seek dismissal of all claims as a matter of law. Specifically, Defendants argue Plaintiff failed to file her charge of gender discrimination with the Equal Employment Opportunity Commission (the "EEOC") within 180 days of the alleged discriminatory act. See 42 U.S.C. § 2000e-5(e)(1). For the reasons stated herein, the Motion for Summary Judgment is **GRANTED.**

The following facts are undisputed. Plaintiff was **[end 1; R.1-23]** employed by Defendant GIW Industries, Inc., in

August of 1976.[1] On March 25, 1994, Plaintiff was terminated, allegedly because of a reduction in force. On September 28, 1994, more than 180 days after her termination, Plaintiff filed a discrimination complaint with the EEOC. Prior to this filing, but before the expiration of the 180-day time limit, Plaintiff filed a complaint on September 15, 1994, with the Richmond County Human Relations Commission (the "RCHRC"). Plaintiff filed the present suit in this Court on March 23, 1995.

A plaintiff may not maintain a Title VII discrimination suit in federal court unless the plaintiff has filed a charge of discrimination with the EEOC within 180 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e)(1).[2] This requirement of filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite, but instead, it is in the nature of a statute of limitations. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1981). **[end 2]**.

In this case, Plaintiff alleges Defendants discriminated against her because of her gender when they terminated her. The limitation period for filing a charge of discrimination began

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[1] Plaintiff's allegations of discrimination against Defendant KSB America Company are premised upon her assertion that it owns 51% of the stock of Defendant GIW.

[2] Section 2000e-5(e)(1) allows 300 days for the required filing with the EEOC if the plaintiff "has initially instituted proceedings with a State or local agency with authority to grant or seek relief" from the alleged discriminatory act. However, Plaintiff does not seek to invoke this extended time period because her filing with the RCHRC was within 180 days of her termination. Thus, the 300-day period is not an issue in this case. Furthermore, Georgia has not designated a Title VII deferral agency for purposes of accepting filed charges, see 29 C.F.R. §§ 1601.13(A), 1601.74; therefore, the 300-day time period is inapplicable to this case.

to run on March 25, 1994, the date of Plaintiff's termination.[3] It is undisputed that plaintiff's filing with the EEOC on September 28, 1994, is not within the 180-day limitation period. Accordingly, Plaintiff's Title VII claims are procedurally barred.

In her Brief in Opposition to Summary Judgment, Plaintiff argues the filing of a complaint with the RCHRC on September 15, 1994, constituted a timely filing of the charges because the RCHRC is an agent for the EEOC for the purpose of accepting filed charges. Plaintiff bases this argument on a "Worksharing Agreement" in which the EEOC and the RCHRC "each designate[d] the other as its agent for the purpose of receiving and drafting charges." Worksharing Agreement (the "Agreement"), II. A. However, the employment practices challenged in this case indisputably arose in Columbia County, Georgia, not Richmond County, Georgia.

The central issue presented by Plaintiff in this case is a simple question of agency: Does the RCHRC have the authority to accept charges on behalf of the EEOC based upon discriminatory acts occurring outside of Richmond County? A **[end 3]** closer review of the Agreement compels a negative response.

Section I. A. of the Agreement specifically states that the "jurisdiction" of the RCHRC extends to unlawful employment practices "occurring within Augusta/Richmond County." Section I. B. limits the scope of the Agreement "to the extent of the common jurisdiction" of the tow agencies. Section II. B. explains that the RCHRC may take complaints

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[3] There is some dispute as to whether the effective date of Plaintiff's termination was March 25 or March 28. This difference, however, is immaterial because the EEOC filing was not made within 180 days of either date.

alleging a violation of Title VII where the agencies "have mutual jurisdiction." Also, section II. C. refers to cooperation between the agencies only "to the extent of their common jurisdiction." By its own terms, the Agreement relied upon by Plaintiff to establish the RCHRC as an agent of the EEOC only contemplates an agency relationship with regard to employment practices occurring within Richmond County, Georgia. Therefore, the RCHRC could not have accepted the filed charges as an agent for the EEOC within 180 days of the alleged discriminatory act.

Under the foregoing analysis, Plaintiff's claims in this case are procedurally barred for failure to file a claim with the EEOC within 180 days of her termination. The Defendants' Motion for Summary Judgment is **GRANTED** hereby. Both Defendants' Motion to Compel Discovery are **DENIED AS MOOT.**

The Clerk is instructed to **CLOSE** this case and **ENTER [end 4] FINAL JUDGMENT** for Defendants. Costs are taxed against Plaintiff.

**ORDER ENTERED** at Augusta, Georgia, this 20th day of March, 1996.

/s/ Dudley H. Bowen, Jr.
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF GEORGIA**
**AUGUSTA DIVISION**
**CIVIL ACTION NO. 195-44**

NANCY PRESCOTT,
Plaintiff,

v.

G.I.W. INDUSTRIES, INC, and
KSB AMERICA COMPANY,
Defendants.

## ORDER

On March 20, 1996, this Court granted Defendants' Motion for Summary Judgment in the above-captioned case. Presently before the Court is Plaintiff's Motion for Reconsideration of the March 20, 1996 Order.[1] For the reasons stated below, the Motion for Reconsideration is **DENIED.**

Plaintiff brought this gender discrimination suit under Title VII of the Civil Rights Act of 1974, 42 U.S.C. §§ 2000e et seq. In their motion for summary judgment Defendants

[1] Plaintiff's motion references both a motion for a new trial under Fed.R.Civ.P. 59 and a motion for reconsideration under Fed.R.Civ.P. 60. The proper vehicle by which to challenge an order of summary judgment is a motion to alter or amend a judgment under Fed.R.Civ.P. 59(e). Because this motion was filed within ten days of the entry of the March 20, 1996 Order, I will construe Plaintiff's Motion for Reconsideration as such. See, e.g., Edward H. Bohlin Co. v. Banning Co., 6 F.3d 350 (5th Cir. 1993).

alleged that Plaintiff failed to satisfy the statutory prerequisites to suit under Title VII; specifically, **[end 1 of R.1-34]** Defendants argued Plaintiff failed to file her charge of gender discrimination with the Equal Employment Opportunity Commission (the "EEOC") within the 180 days of the alleged discriminatory act. See 42 U.S.C. § 2000e-5(e)(1).

The procedural posture of the case was not in dispute. The issue before the Court involved a determination of whether Plaintiff's filing of a discrimination complaint with the Richmond County Human Relations Commission (the "RCHRC") within the 180-day period constituted a timely filing with the EEOC. Plaintiff argued the RCHRC is an agent for the EEOC for the purpose of accepting filed charges because of a "Worksharing Agreement" between the agencies. Based upon the clear and unambiguous language of the Worksharing Agreement this Court found that even if the RCHRC is an agent for the EEOC, the scope of this agency relationship is confined to discriminatory acts occurring within Richmond County, Georgia. Accordingly, the RCHRC filing was found insufficient to satisfy the procedural prerequisite of filing a charge with the EEOC within 180 days of the alleged discriminatory act. Plaintiff's Title VII claim thus was procedurally barred.

In her Motion for Reconsideration, Plaintiff submits the declarations of two RCHRC employees by which the declarants state that they understand the Worksharing Agreement to allow the RCHRC to accept a filing on behalf of the EEOC for any **[end 2]** charge in Georgia. In addition, Plaintiff has elicited the aid of the Regional Attorney of the United States EEOC, William D. Snapp. Mr. Snapp informed this Court by letter dated April 4, 1996, that the EEOC, as amicus curiae, may seek the opportunity to address the issues raised for leave to file the affidavit of the Acting District Director of the EEOC "to assist the Court in rendering a decision interpreting the contractual

and procedural relationship between the E.E.O.C. and the Richmond County Human Relations Commission." Defendants opposed the motion because the EEOC is not a party to this suit, see Fed.R.Civ.P. 43(e), 56(c) (limiting the submission of affidavits for consideration on a motion for summary judgment to the parties of an action), and the EEOC has not heretofore requested or received amicus curiae status in this case. On May 13, 1996, Plaintiff filed the affidavit of the Acting District Director of the EEOC into the record; therefore, the Motion for Leave to File Affidavit by the EEOC is **DENIED AS MOOT.**

As a result of this procedural jousting, before the Court are three affidavits of employees of either the EEOC or the RCHRC in support of Plaintiff's Motion for Reconsideration. Plaintiff's motion is predicated on essentially the same argument previously advanced in opposition to Defendants' motion for summary judgment. Essentially, Plaintiff asserts **[end 3]** that the scope of the agency relationship between the EEOC and the RCHRC extends to discriminatory acts occurring outside Richmond County. Having already considered and rejected this argument, the Court will not readdress it except to point out that the affidavits belatedly submitted by Plaintiff cannot be used to contradict the clear and unambiguous language of the Worksharing Agreement which specifically addresses the agency question at issue. R.C. Craig, Ltd. v. Ships of the Sea, Inc., 401 F.Supp. 1051, 1058 (S.D.Ga. 1975) ("[P]arol evidence cannot be employed to add to, take from, or vary the terms of the written agreement.").

There is no doubt that the result is harsh to a plaintiff who would have little reason to know the details of an inter-agency agreement. However, a harsh result cannot be used as the excuse to dismantle the law in a result-oriented quest for subjective fairness.

For the foregoing reasons, Plaintiff's Motion for Reconsideration is **DENIED.**

**ORDER ENTERED** at Augusta, Georgia, this 23rd day of May, 1996.

/s/Dudley Bowen, Jr.
UNITED STATES DISTRICT JUDGE
**[end 4]**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 96-8545
Non-Argument Calendar

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D.C. Docket No. CV195-44

NANCY PRESCOTT,

Plaintiff-Appellant,

versus

GIW INDUSTRIES; KSB AMERICA COMPANY,

Defendants-Appellees,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Movant.

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Appeal from the United States District Court
for the Southern District of Georgia

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**(February 26, 1997)**

Before HATCHETT, Chief Judge, TJOFLAT, and EDMONDSON, Circuit Judges.

PER CURIAM:

We agree with the district court for the reasons stated in its dispositive orders of March 20 and May 23, 1996, that appellant's Title VII claim is barred. In addition , we find no abuse of discretion in the district court's denial of appellant's motion for reconsideration of the court's March 20, 1996, order granting appellees' motion for summary judgment.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8545

NANCY PRESCOTT,

Plaintiff-Appellant,

versus

GIW INDUSTRIES; KSB AMERICA COMPANY,

Defendants-Appellees,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Movant.

On Appeal from the United States District Court for the
Southern District of Georgia
ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion_____, 11th Cir., 19_, __F.2d __).

Before: HATCHETT, Chief Judge, TJOFLAT and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) or Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/Gerald Tjoflat
UNITED STATES CIRCUIT JUDGE
[stamp dated April 30, 1997]

## Constitutional Provisions, Statutes

### Amendment V

...[N]or [shall any person] be deprived of life, liberty, or property, without due process of law....

### Amendment XIV

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### Statutes

42 U.S.C. § 2000e [§ 705] EEOC

42 U.S.C. § 2000e-4. [§ 705]

Principal and other offices

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this subchapter.

Powers of Commission

(g) The Commission shall have power —

(1) to cooperate with and, with their consent, utilize regional, State, local and other agencies, both public and

private, and individuals;

42 U.S.C. §2000e-5 [§706]

Enforcement provisions

Charges by persons aggrieved etc.; filing;....

(b) Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.

State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purpose of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

(e)(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Code of Federal Regulations

29 C.F.R. § 1600

29 C.F.R. § 1601.6 Submission of information.

(a) The Commission shall receive information concerning alleged violations of title VII of the ADA from any person. Where information discloses that a person is entitled to file a charge with the Commission, the appropriate office shall render assistance in the filing of the charge. Any person or organization may request the issuance of a Commissioner charge for an inquiry into individual or systemic discrimination.

Such request, with any pertinent information shall be submitted to the nearest field office.

29 C.F.R. § 1601.8 Where to make a charge.

A charge may be made in person or by mail at the offices of the Commission in Washington, DC, or any of its field offices or with any designated representative of the Commission. The addresses of the Commission's field offices appear in § 1610.4.

29 C.F.R.§ 16.01.9 Form of charge.

A charge shall be in writing and signed and shall be verified.

29 C.F.R. § 1601.12. Contents of charge; amendment of charge.

(a) Each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge except as provided in § 1601.7;

(2) The full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent);

(3) A clear and concise statement of the facts, including pertinent, dates, constituting the alleged unlawful employment practices: See § 1601.15(b);

(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the

case may be; and

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local agency charged with the enforcement of fair employment practice laws and if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A Charge that has been so amended shall not be required to be redeferred.

C.F.R. § 1601.13 Filing deferrals to State and local agencies.

(a) *Initial presentation of a charge to the Commission.* (1) Charges arising in jurisdictions having no FEP agency are filed with the Commission upon receipt. Such charges are timely filed if received by the Commission within 180 days from the date of the alleged violation.

(2) A jurisdiction having a FEP agency without subject

matter jurisdiction over a charge (e.g., an agency which does not cover sex discrimination or does not cover nonprofit organizations) is equivalent to a jurisdiction having no FEP agency. Charges over which a FEP agency has no subject matter jurisdiction are filed with the Commission upon receipt and are timely filed if received by the Commission within 180 days from the date of the alleged violation.

(3) Charges arising in jurisdictions having a FEP agency with subject matter jurisdiction over the charges are to be processed in accordance with the Commission's deferral policy set forth below and the procedures in paragraph (a)(4) of this section.

(i) In order to give full weight to the policy of section 706(c) of title VII, which affords State and local fair employment practice agencies that come within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by title VII or the ADA and State or local law, the Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to State and local agencies as if permitted by law and as is practicable.

... [other deferral matter]...

(c) *Agreements with Fair Employment Practice agencies.* Pursuant to section 705(g)(1) and section

606(b) of title VII, the Commission shall endeavor to enter into agreements with FEP agencies to establish effective and integrated resolution procedures. Such agreements may include, but need not be limited to, cooperative arrangements to provide for processing of certain charges by the Commission, rather than by the FEP agency during the period specified in section 706(c) and section 706(d) of title VII.

29 C.F.R. § 1601.71 FEP agency notification.

(a) When the Commission determines that an agency or authority meets the criteria outlined in section 706(c) of title VII and § 1601.70, the Commission shall so notify the agency by letter and shall notify the public by publication in the FEDERAL REGISTER of an amendment to § 1601.74.

(b) Where the Program Director, Office of Program Operations determines that an agency or authority does not come within the definition of a FEP agency for purposes of a particular basis of discrimination or where the agency or authority applies for designation as a Notice Agency, the Commission shall notify that agency or authority of the filing of charges for which the agency or authority is not a FEP agency. For such purposes that State or local agency will be deemed a Notice Agency.

29 C.F.R. § 1601.74 Designated and notice agencies.

(a) The designated FEP agencies are :

Alaska Commission for Human Rights
Austin (TX) Human Relations Commission [3]

[[3] The Austin (TX) Human Relations Commission has been designated as FEP agency for all charges except charges alleging a violation of title VII by a government, government agency, or political subdivision of the State of Texas.

For these types of charges it shall be deemed a "Notice Agency," pursuant to 29 C.F.R. 1601.71 (b).]

(a) Georgia Office of Fair Employment Practices [6]

[6] The Georgia Office of Fair Employment Practices has been designated as a FEP agency for all charges covering the employment practices of the departments of the State of Georgia only.]

Richmond County (GA) Human Rights Commission

(b) The designated Notice Agencies are:

Arkansas Governor's Committee on Human Resources
Ohio Director of Industrial Relations
Raleigh (NC) Human Resources Department, Civil Rights Unit

# ORDINANCE

## Ordinance - Creating Richmond County Human Relations Commission , passed 01/18/83

## (Selected Portions)

An ordinance to create a human relations commission prescribe its composition. The terms of office of its members, its officers, their terms of office and compensation, to provide for an executive director, its office space, appropriations, meetings, rules, reports, duties and powers, to repeal an ordinance adopted October 6, 1981, and for other purposes.

The Board of Commissioners of Richmond County hereby ordains:

Section 1. Establishment.

There is hereby created a Human Relations Commission for the County of Richmond...

Section 14. Duties and Powers.

It shall be the duty of the Commission to:...

(i) Investigate and study complaints, problems and specific situations arising between groups or individuals which result or may result in tensions, discrimination or prejudice in the County on account of race, color, religion, national origin, handicap or age;

(j) Receive, initiate, investigate and pass upon complaints alleging discrimination in employment, and public accommodation because of race, religion, color, sex, national origin, handicap or age;....

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF GEORGIA**
**AUGUSTA DIVISION**
**CIVIL ACTION NO. CV 195-44**

| | |
|---|---|
| NANCY PRESCOTT, | ) |
| Plaintiff, | ) |
| | ) |
| vs. | ) |
| | ) |
| G.I.W. INDUSTRIES, INC., and | ) |
| KSB AMERICA COMPANY, | ) |
| Defendants. | ) |
| | ) |

AFFIDAVIT OF BERNICE WILLIAMS-KIMBROUGH

Personally appeared before the undersigned, an officer duly authorized to administer oaths, Bernice Williams-Kimbrough, being duly sworn, deposes and states as follows:

1. My name is Bernice Williams-Kimbrough. I am an adult and am competent to make this Affidavit and my signature below.

2. I am the District Director (Acting) of the Atlanta District Office, (hereinafter referred to as the "ATDO"), of the Equal Employment Opportunity Commission (hereinafter referred to as the "EEOC"). **[end 1; R.1-30; R.1-32;Williams-Kimbrough Aff.]**.

3. I have served in the capacity of either the District Director (Acting) or the Deputy Director of the ATDO since 1990. As such, I am familiar with the ATDO and EEOC contractual relationships with Federal Employment Practices Agencies, (hereinafter "FEP Agency"), in the State of Georgia.

4. The Richmond County Human Relations Commission, (hereinafter the "HRC"), is a FEP Agency which has had an ongoing contract, (titled "Workshare Agreement"), with the

ATDO of the EEOC at all times during my tenure with the ATDO, *i.e.* since 1990.

5. The Workshare Agreement between the ATDO and the HRC, (hereinafter the "Agreement"), is annually negotiated and executed by the District Director of the ATDO and the Director of the HRC.

6. In September, 1994, an Agreement was in effect between the EEOC and the HRC. This Agreement, effective for the period October 1, 1993 through September 30, 1994, had been entered into and executed in September, 1993 by **[end 2]** Chris Roggerson, then District Director of the ATDO, and by Frank C. Thomas, District Director of the HRC. A copy of the Agreement is found attached as Exhibit A to Plaintiff's Brief in Opposition to Defendants Motion for Summary Judgment filed in this above-captioned action.

7. Pursuant to the Agreement between the EEOC and the HRC, it was the intent of the EEOC that the HRC would accept charges for filing on behalf of the EEOC for two different types of cases.

8. First, the HRC was authorized to accept charges for the EEOC over which the HRC has geographic and subject matter jurisdiction: *i.e.* where the employer is located within the geographic boundaries of Richmond County, Georgia and the charge alleges discrimination based on race, color, religion, sex, national origin, handicap or age.

9. Second, the HRC was authorized to accept charges for the EEOC over which the HRC did not have geographic jurisdiction but where the alleged discrimination occurred within the jurisdiction of the EEOC's Atlanta District Office: *i.e.* where the employer is located anywhere within the State of Georgia **[end 3]** and the charge alleges discrimination based on race, color, religion, sex, national origin, handicap, disability or age.

10. Pursuant to the on-going authorization to accept charges on behalf of and as agent for the EEOC, the HRC places an EEOC case number on those charges over which the EEOC has

jurisdiction. This number is assigned by the ATDO.

11. An example of an EEOC number assigned for use by the HRC would be "11A-94-0198." The first three digits ("11A") of this EEOC number refer to and identify the case as arising in the State of Georgia and filed with the HRC, a FEP agency. The next two digits ("94") refer to the federal government's fiscal year of receipt. The last four digits ("0198") reference the numeric sequence of receipt of the charge by the HRC.

12. The HRC also places its own, separate number on the charges it receives. This number reflects the month and year of filing and the sequential number of receipt by the HRC. **[end 4]**.

13. Attached hereto as Exhibit A is a copy of a computer print-out form used by the EEOC to record charges filed with FEP Agencies. This particular print-out shows the charges filed with the HRC in August and September, 1994 where the EEOC has jurisdiction over the charge. These particular charges were all timely filed and administratively transferred to the ATDO for further processing.

14. The first column contains the EEOC charge number. The second and third columns are for the name of the Charging Party and the Respondent (employer). The fourth column shows the charge receipt office (the HRC).

15. The fifth column references the statute allegedly violated, (e.g. Title VII, ADEA). The next column shows the age of the violation when filed with the HRC/EEOC. The seventh column is for the EEOC code for the basis and issues type alleged. For example, "RBH1" refers to race-black and harassment: "GF" refers to gender-female, "P3" refers to promotion.

16. The eight column shows the date the charge was signed or executed by the charging party. In the instant case, this date is September 8, 1994. The ninth **[end 5]** column reflects the time expired between the execution of the charge and the receipt of the charge by the HRC.

17. The ninth column, "AO date," refers to the date that the

HRC electronically notified the EEOC that it was administratively transferring the file to the ATDO. The next two columns (11 and 12) identify the transferring office, *i.e.* the HRC.

18. The last column (13) shows the date that the ATDO responded, electronically, that it had received the case for further processing. In the instant case, the ATDO notified the HRC on September 23, 1994 that the ATDO was in electronic receipt of the charge.

19. The EEOC paid the HRC the sum of Fifty Dollars ($50.00) to accept charge 11A-94-0198 for filing on behalf of the EEOC.

20. The EEOC treated charge 11A-94-0198 as timely filed during the period that the EEOC administratively processed the charge. **[end 6]**.

21. It is the current position of the EEOC that the charge (11A-94-0198) upon which the above-captioned litigation is based was timely filed within 180 days when it was filed with the HRC on or about September 15, 1994.

FURTHER AFFIANT SAYETH NOT:

/s/Bernice Williams-Kimbrough
BERNICE WILLIAMS-KIMBROUGH

Before me, the undersigned Notary Public, appeared Bernice Williams-Kimbrough, a person well known to me, who, being duly sworn, signed and executed this seven (7) page document on this 15 day of April, 1996.

/s/ illegible

**[end 7]**

Exhibit A
to District Director Kimbrough Affidavit

EEOC National Computer Printout
1 Charge No: 11A940198
2 CP Name : Prescott
3 Respondent Name : GIW INDUSTRIES, INC.
4 Rcv Off :11A
5 Stat: TAE
6 Viol Age: 175
7 Basis/Issues: GF DA DR PF P3
8 Charge Date: 090894
9 Chg Age: 11
10 AO Date: 091994
11 AO Off: 11A
12 Al Flg: A
13 Response by 110 Acct Date FU Attr
A1 092394 11 11A

Selected Portions of EEOC
Eleventh Circuit Amicus Brief (filed 8/22/96)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 96-8545

NANCY PRESCOTT,

Plaintiff-Appellant,

v.

G.I.W. INDUSTRIES, INC., and
KSB AMERICA COMPANY,

Defendants-Appellees.

On Appeal from United States District Court for the
Southern District of Georgia Augusta Division

# BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

## STATEMENT OF INTEREST

The United States Equal Employment Opportunity Commission ("EEOC" or "Commission") is the agency charged by Congress with the administration, interpretation and enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and other laws prohibiting employment

discrimination. One of the issues raised in this appeal is whether plaintiff's charge, timely filed with and accepted by a local Fair Employment Practices ("FEP") agency lacking geographic jurisdiction over the charge, is deemed simultaneously filed with the EEOC. **[end 1; Amicus Brief EEOC 11th Cir. August 1996]**. In this case, the worksharing agreement between the local agency and the EEOC provides that the FEP will act as an agent for the EEOC for the purpose of filing charges, but does not specifically grant the local agency authority to accept extraterritorial charges. The other issue presented is whether electronic transfer of a charge from a Fair Employment Practices Agency to the EEOC constitutes an effective filing of a charge with the EEOC, thereby making it timely filed. Because these are issues of recurring concern in the administration of Title VII, the Commission offers its views to the Court.

## STATEMENT OF THE ISSUES[1]

(1) Whether a charge, submitted to a local fair employment practices ("FEP") agency lacking geographic jurisdiction over the charge, should be deemed simultaneously filed with the EEOC where the worksharing agreement between the local agency and the EEOC designates each agency as the agent of the other for the purpose of filing charges.

(2) Whether the electronic transfer of a charge from an FEP agency to the EEOC constitutes an effective filing of a charge with the EEOC, thereby making the charge at issue in this case timely filed. **[end 2]**.

## SUMMARY OF ARGUMENT

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[1] [n. at 2 orig.] The Commission takes no position with respect to other issues raised by the Appellant.

Prescott's charge was properly filed with the RCHRC less than 180 days after Prescott's discharge in accordance with the worksharing agreement between the EEOC even though the RCHRC was without authority to process the charge. **[end 7]**. The worksharing agreement entered into by the EEOC and the RCHRC provides that each entity will be an agent for the other for the purpose of receiving and drafting charges. To construe the agreement narrowly to prohibit charging parties alleging discriminatory practices in Georgia but outside Richmond County from filing charges with the RCHRC is to make the language of the agreement irreconcilable with its purpose to provide claimants with an efficient and convenient procedure for obtaining redress of their rights.

Moreover, to the extent that any of the other provisions of the worksharing agreement seem inconsistent with this conclusion, those provisions do not govern the circumstances of this case. At the very least, these provisions do not contain "clear and unambiguous" language prohibiting the RCHRC from transmitting to the EEOC charges over which it lacks geographic jurisdiction. Where the language of the agreement is not completely clear, extrinsic evidence of the parties' intent must be considered, and the district court erred in refusing to consider the affidavits of the contracting agencies explaining their understanding of the agreement. The EEOC and the RCHRC, the sole parties to the worksharing agreement, interpret the agreement's provisions as authorizing the RCHRC, as agent for the EEOC, to receive and draft charges alleging discriminatory practices within the State of Georgia but outside of the local agency's geographic jurisdiction, Richmond County. **[end 8]**. Pursuant to that understanding, the RCHRC accepted for filing Prescott's charge, alleging her former employer located in Columbia County, Georgia, violated Title VII when it subjected her to adverse employment actions and terminated her in retaliation for objecting to practices she believed to be discriminatory.

The limitations period for charge filing is subject to tolling and waiver as equity requires. Consequently, even if the EEOC and the RCHRC erroneously interpreted the provisions of its agreement, equity demands that the charge be considered timely filed with the EEOC. Any administrative error committed by the EEOC or the RCHRC should not redound to an innocent charging party's detriment.

Finally, the evidence submitted in this case demonstrates that Prescott filed a timely charge with the EEOC. The RCHRC electronically transferred Prescott's charge to EEOC headquarters on September 19, 1994, 178 days after her termination. Because the acceptance of a charge at any EEOC office, including headquarters, constitutes the filing of the charge for purposes of the statute of limitations. Prescott's charge was timely filed. **[end 9]**.

## ARGUMENT

### I. BECAUSE THE RCHRC IS EEOC'S AGENT FOR THE PURPOSE RECEIVING DISCRIMINATION CHARGES UNDER THE WORKSHARING AGREEMENT BETWEEN THE EEOC AND THE RCHRC, PRESCOTT'S CHARGE WAS PROPERLY FILED WITH THE EEOC WHEN IT WAS RECEIVED BY THE RCHRC FEWER THAN 180 DAYS AFTER PRESCOTT'S DISCHARGE.

The worksharing agreement between the EEOC and the RCHRC authorizes the RCHRC to accept charges for the EEOC over which the RCHRC has geographic jurisdiction as well as charges over which the RCHRC does not have geographic jurisdiction because the alleged discrimination occurred within the State of Georgia but outside of Richmond

County.[7] Section 706(e) of Title VII provides that a complainant must file a charge of employment discrimination with the EEOC within 180 days of the alleged discrimination.[8] 42 U.S.C. § 2000e-5(e). **[end 10]**. Consequently, the date the RCHRC received the charge should be treated as the date on which the charge was filed with the EEOC for statute of limitations purposes.

A. Express Terms Of The Worksharing Agreement Permit Charges Alleging Discriminatory Employment Practices In Georgia But Outside Richmond County To Be Deemed Filed With the EEOC On The Date They Are Received By The RCHRC.

Pursuant to § 709(b), the Commission and the RCHRC entered into a worksharing agreement to promote "effective enforcement" of Title VII. 42 U.S.C. § 2000e-8(b); see also 42 U.S.C. § 2000e-4(g)(1). The worksharing agreement provides that EEOC and RCHRC will each be an agent of the other for the purpose of filing charges. See Addendum, Exh. A at ii, §

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[7] [n. at 10 orig.] The RCHRC is the local FEP agency charged with the authority to investigate discriminatory practices, to receive written charges alleging violations of the civil rights laws, to investigate such charges or to conduct such investigations in the absence of individual charges whenever it is deemed in the public interest. Therefore, the RCHRC is a deferral agency within the scope and meaning of § 706(c) and (d), 42 U.S.C. § 2000e-5(c) and (d). See 29 C.F.R. § 1601.74(a) (listing RCHRC as a designated FEP agency).

[8] [n. at 10-11 orig.] Section 706(e) also states that, where proceedings have been instituted with a state or local fair employment practices agency "with authority to grant or seek relief," the charge must be filed with the EEOC within 300 days. 42 U.S.C. § 2000e-5(e). However, because the RCHRC does not have authority to grant or seek relief for violations occurring in Columbia County, Georgia, Prescott's charge was governed by the 180-day rather than the 300-day statute of limitations.

II.A; see also, 29 C.F.R. § 1601.8 (charges may be filed "with any designated representative of the Commission"). The agreement further provides that the RCHRC will assign to "all charges taken at its office" a charge number, Exh. A at ii, § II.E., and that the EEOC will pay the RCHRC a fee for accepted charge resolutions, id at v-vi, § V.C.-E. Thus, by its express terms, the worksharing agreement permits the RCHRC to act as the agent of the EEOC for the purpose of receiving and filing discrimination charges over which it does not have geographic jurisdiction, even though the RCHRC does not have the authority to initiate processing of those charges. **[end 11]**.

Moreover, the "Contracting Principles" surrounding this and all worksharing agreements between the EEOC and state and local FEPAs support the conclusion that the worksharing agreement authorized the RCHRC to accept for filing a charge outside of its jurisdiction. The principles expressly state that FEPAs will receive "$40 per accepted charge for performing certain intake services on charges not jurisdictional with the intake agency and which EEOC will process." See Addendum, Exh. B. at 13. Consistent with these principles, the RCHRC accepted Prescott's charge, assigned to it an EEOC number, and the EEOC paid the RCHRC the $40.00 intake service fee. Thus, Prescott's charge should be deemed to have been filed with the EEOC on September 19,1994.

The district court's reliance on three provisions of the worksharing agreement which it says clearly prohibit the RCHRC from accepting charges originating in Georgia but outside of Richmond County is misplaced. 3/21/96 decision at 4. Contrary to the court's assertion that the worksharing agreement sets forth, in "clear and unambiguous language," that the RCHRC does not have authority to file charges over which it does not have geographic jurisdiction, 5/23/96 decision at 4, the agreement does not prohibit the RCHRC from accepting charges such as the one at issue in this case. **[end 12]**.

Section II.B. states, "The FEPA shall take all charges

alleging a violation of Title VII, ADEA, EPA, or the ADA where the parties have mutual jurisdiction and refer them to the EEOC, so long as the allegations meet the minimum requirements of those Acts." While this provision requires the RCHRC to take all charges over which there is mutual jurisdiction, nothing in the language can be read to prohibit the RCHRC from accepting charges over which it does not have geographic jurisdiction but the EEOC does have jurisdiction exists. Section II.C. states that "[e]ach agency will inform individuals of their rights to file charges with the other Agency and or assist any person alleging employment discrimination to draft a charge in a manner which will satisfy the requirements of both agencies to the extent of their common jurisdiction." The purpose of this section is to ensure that each agency assists a charging party only to the extent of its expertise. Contrary to the district court's rationale, this section does not substantiate its conclusion that the RCHRC may not accept charges over which it does not have jurisdiction. **[end 13]**.

The court also identifies section I.B. as a provision which limits the scope of the agreement to cover only circumstances in which both the EEOC and the RCHRC have both geographic and subject matter jurisdiction.[9] See Addendum, Exh. A at I. The boilerplate language in section I.B. referring to the mutual jurisdiction of the two agencies is not included, as the district court found, for the purpose of limiting the RCHRC's authority to accept and file charges.

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[9] Section I.B. of the worksharing agreement states:
In recognition of, and to the extent of the common jurisdiction and goals of the two (2) Agencies, and in consideration of the mutual promises and covenants contained herein, the FEPA and the EEOC hereby agree to the terms of this Worksharing Agreement, which is designed to provide individuals with an efficient procedure for obtaining redress for their grievances under appropriate (Richmond County, GA) or Federal laws.

Rather, that language is included for the purpose of preventing a state or local agency without geographic jurisdiction from waiving the referral rights of another state or local agency without geographic jurisdiction from waiving the referral rights of another state or local agency with geographic jurisdiction to receive the charge. Thus, for example, if an individual whose rights are violated in Florida files a charge with the FEP agency in Louisiana, the Louisiana FEP agency could not process the charge under its state law, or waive the Florida FEP agency's right to initial processing of the charge because such action would intrude on the Florida FEP agency's statutory right to process the charge.

Moreover, the language of section I.B. is consistent with one of the main purposes of the inter-agency agreement -- "to avoid duplication of effort by apportioning the responsibilities for processing charges." EEOC v. Donald E. Green Law Offices, 76 f.3d 19, 21 (1st Cir. 1996). **[end 14]**. Because there was no possibility of duplication of effort in a case such as this, section I.B. has no relevance. Here, the county agency accepted for filing a charge involving employment actions in another county in the same state where no county or state FEP agency has jurisdiction over the charge. The only entity with jurisdiction to process the charge is the EEOC. Therefore, the only entity with an interest in the charge is the EEOC and the EEOC, of course, does not object to the RCHRC accepting charges for alleged violations occurring in Georgia but outside Richmond County and transferring those charges to the Commission for processing.

Further, while section I.B. makes clear that areas of mutual jurisdiction are governed by the agreement, this section's reference to mutual jurisdiction was not intended to preclude the agreement from reaching agency activities over

which mutual jurisdiction does not exist. Section II.H.[10] clearly contemplates the receipt of charges over which jurisdiction is not mutual. Otherwise, there would be no question of the other agency's jurisdiction. See Addendum, Exh. A at iii, § II.H. More importantly, the provision stating that RCHRC and EEOC are each the agent of the other for the purpose of filing charges, id. at ii, § II.A., has no limiting language or reference only to charges over which the two agencies have "mutual jurisdiction." **[end 15].**

B. Construing The Worksharing Agreement As Authorizing The RCHRC To Accept For Filing All Charges Alleging Discriminatory Practices In The State Of Georgia, Including Those Whose Situs Is Outside Richmond County, Is Consistent With The Parties' Intent, The Agreement's Stated Purpose And Principles Of Equity

At a minimum, the agreement's language cannot be fairly characterized as "clear and unambiguous" and the district court erred in holding to the contrary. Even if the wording does not clearly authorize the RCHRC to file charges such as Prescott's, the wording certainly does not clearly prohibit the RCHRC from accepting charges such as Prescott's for filing. And, where the intent of an agreement's provisions is not clear from the face of the document, courts may rely on extrinsic evidence to ensure that the parties' intent is enforced and the district court committed a legal error in refusing to consider such evidence. Restatement (Second) of Contracts, § 202, comment c, § 212 comment b (1981); Stewart v. KHD Deutz of America, Corp., 980 F.2d 698, 704 (11th Cir. 1983) (where each interpretation of contract provisions is plausible, trial court errs by failing to consider extrinsic evidence); Orkin

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[10] Section II.H. states:

The delegations of authority to receive charges contained in Paragraph II.a. does not include the right of one Agency to determine the jurisdiction of the other Agency over a charge.

Exterminating Co. v. FTC, 849 F.2d 1354, 1362-63 (11th Cir. 1988) (where a contract is ambiguous, extrinsic evidence is admissible to explain that ambiguity), cert. denied, 488 U.S. 1041 (1989). See also Boilermakers, 858 F.2d at 1561 (whether a contract is ambiguous is a question of law). **[end 16].**

Moreover, even if the district court correctly characterized the worksharing agreement's language as unambiguous on this issue, the analysis cannot end there when the intent of the parties is equally unambiguous. As the Seventh Circuit has stated, "the overriding purpose in construing a contract is to give effect to the mutual intent of the parties at the time the contract was made; [] while the language of the contract is normally the best evidence of that intent, a court can properly disregard even unambiguous language when it is convinced that the parties meant something different form what they said." White v. Roughton, 689 F.2d 118, 120 (7th Cir. 1982). In this case, the agencies' understanding of how the worksharing agreement should operate, as demonstrated by the affidavits of the EEOC and the RCHRC, is strong evidence of the parties' intent as to how the agreement would operate. Officials of both agencies clearly attested that it was their intent that the RCHRC would accept charges involving employers in Georgia even if the RCHRC lacked geographic jurisdiction over the charges; and that it would transmit those charges to the EEOC.

The district court's construction of section I.B. is inconsistent not only with the parties' intent but also with the agreement's stated purpose, "to provide individuals with an efficient procedure for obtaining redress for their grievances under appropriate...Federal laws, "and would unnecessarily deprive alleged victims of discrimination of their right to redress because of an administrative technicality over which they have no control. See Addendum, Exh. A. at I, § I.B. **[end 17].** See EEOC v. Commercial Office Products, 486 U.S. 107, 118

(1988) (a purpose of the worksharing agreement is "to promote 'time economy and the expeditious handling of cases'" (quoting 110 Cong. Rec. 9790 (1964) (remarks of Sen. Dirksen))); Ford v. Bernard Fineson Development Center, 81 F.3d 304, 307 n.5 (2d Cir. 1996) (worksharing agreements entered into by the EEOC and a state or local FEP agency "are principally intended to benefit third parties"). A contract should be interpreted to give effect to all its provisions. Guaranty Financial Services v. Ryan, 928 F.2d 994, 999 (11th Cir. 1991). Consequently, section I.B. should not be read in a manner which undermines the agreement's stated aim. See also Atlantic Lines, Ltd. v. Narwhal, Ltd., 514 F.2d 726, 730 (5th Cir. 1975) (when determining the meaning of particular contract provisions, "court(s) should give special consideration to the purposes" for the provisions' inclusion). Given the agreement's stated overall purpose to provide an efficient administrative procedure for filing charges, the EEOC's interpretation that the RCHRC is permitted to accept charges over which it lacks geographic jurisdiction is eminently reasonable. If this Court believes the agreement's language limits the RCHRC's authority to file only those charges alleging discrimination in Richmond County, at the very least this is a case in which the EEOC and the RCHRC "meant something different from what they said," see White, 689 F.2d at 120, and, this Court must conclude that the agreement is ambiguous on the issue in question. Boilermakers, 858 F.2d at 1561. **[end 18].** In light of that ambiguity, the district court should have considered the RCHRC and the EEOC affidavits to determine the intent of the worksharing agreement provisions. See Sofferin v. American Airlines, 923 F.2d 552 (7th Cir. 1991) (remand to district court for evidentiary hearing necessary where proper meaning of worksharing agreement's ambiguous provisions must be determined).

Finally, equity demands that the charge be considered filed with the EEOC once it was received by the RCHRC. The jurisdictional requirements of Title VII are "subject to waiver as

well as tolling when equity so requires." Zipes v. Transworld Airlines, 455 U.S. 385, 393 (1982). In this case, any failure to meet the filing requirements was the result of acts or omissions by the administrative agencies involved, not Prescott. An administrative error by the EEOC should not prejudice an innocent charging party. See Jefferson v. Peerless Pumps, 456 F.2d 1359, 1361 (9th Cir. 1972) (Title VII "does not condition an individual's right to sue upon the EEOC's performance of its administrative duties"); Patterson v. American Tobacco Co., 535 F.2d 257, 272 (4th Cir. 1976) ("plaintiffs are not to be barred from Title VII action due to possible error [or] neglect...by the EEOC...."); Miller v. International Paper Co., 408 F.2d 283, 290 (5th Cir. 1969) (substantive rights of victim not affected by EEOC action or inaction). Therefore, even if this Court were to hold that the agreement does not authorize the RCHRC to accept for filing charges outside its geographic jurisdiction, it should waive the requirement of timely filing with the EEOC and order the case to proceed in the district court. **[end 19 ]**.

## II. EVEN IF THE RCHRC FILLING WAS NOT A FILING WITH THE EEOC, PRESCOTT'S CHARGE WAS FILED DIRECTLY WITH THE EEOC WITHIN 180 DAYS AND WAS, THEREFORE, TIMELY

In the alternative, even if this Court concludes that a charge is deemed filed only when it is received by an entity with both subject matter and geographic jurisdiction, this Court must hold that Prescott's charge was nonetheless timely filed. The facts, as presented to the district court, incontrovertibly demonstrate that the Commission received the electronic transmittal of the charge in Washington, D.C. on September 19, 1994, 178 days after the allegedly discriminatory action.

The evidence submitted to the district court establishes that Prescott's charge was timely filed with the Commission and that the district court erred in failing to so hold. The record

shows that the RCHRC electronically transferred Prescott's charge to the EEOC on the date it received the charge, September 19, 1994, 178 days after the challenged termination. Although the transfer to the Atlanta district office was not complete until September 23, 1996, after the statute of limitations had expired, the relevant date for statute of limitations purposes is the first date on which the Commission received the charge. See 29 C.F.R. § 1601.8 (charges may be filed "at the offices of the Commission in Washington, D.C., or any of its filed offices") and 29 C.F.R. § 1601.13(a)(1) ("Charges arising in jurisdictions having no FEP Agency are filed with the Commission upon receipt.") (emphasis added). [n. at 20 orig.]. Cf. Sofferin, 923 F.2d at 555 (charge deemed timely filed with EEOC's Detroit office even though it was not received by EEOC's Chicago office, which had jurisdiction to process, until after limitations period expired). Because the charge was received by the Commission in fewer than 180 days, the district court erred when it dismissed Prescott's charge as untimely. **[end 21]**.

## CONCLUSION

For the foregoing reasons, the district court's decision should be reversed and the case remanded with instructions to reinstate Prescott's Title VII action.

Respectfully submitted,
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GWENDOLYN YOUNG REAMS
Associate General Counsel
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Assistant General Counsel
/s/ Susan L. P. Starr
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202/663-4726
[end 22].

[Found as Exhibit A to RCHRC Director Thomas Aff.; R.1-15- Thomas Aff. Ex. A; Exhibit A to EEOC Amicus Brief]

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# WORKSHARING AGREEMENT
between
RICHMOND COUNTY
HUMAN RELATIONS COMMISSION
and the
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
FOR FISCAL YEAR 1994

## I. INTRODUCTION

A. The Richmond County Human Relations Commission, hereinafter referred to as the **FEPA**, has jurisdiction over allegations of employment discrimination filed against employers of 15 or more employees occurring within Augusta/Richmond County, pursuant to an Ordinance of the Richmond County Board of Commisioners.

The EqualEmployment Opportunity Commission, hereinafter referred to as **EEOC**, has jurisdiction over allegations of employment discrimination occurring throughou the United States where such charges are based on race, color, religion, sex, or nationalorigin, all pursuant to Title VII of the Civil Rghts Act of 1964, as amended (42 U.S.C., 2000(e) hereinafter referred to as Title VII). EECC has jurisdiction to investigate and determine charges of discrimination based on age (40or older) under the Age

Discrimination in Employment Act (ADEA) OF 1967, As amended (29 U.S.C., 621 et. seq.), for unequal wages based on sex under the Equal Pay Act of 1963 (29 U.S.C., 206), and over allegations of employment discrimination based on disability pursuant to Title I of the Americans with Disabilities Act of 1991, (42 U.S.C., 12101).

B. In recognition of, and to the extent of the common jurisdiction and goals of the two (2) Agencies, and in consideration of the mutual promises and covenants contained herein, the ~~FEPA and the EEOC hereby agree to the~~ terms of this Worksharing Agreement, which is designed to provide individuals with an efficient procedure for obtaining redress for their grievances under appropriate (Richmond County, GA.) or Federal laws. **[end I; R.1-15; Thomas Aff. Ex. A; Ex. A, EEOC 11th Cir. Amicus Brief]**.

## II. FILING OF CHARGES OF DISCRIMINATION

A. In order to facilitate the assertion of employment rights, the EEOC and the FEPA each designate the other as its agent for the purpose of receiving and drafting charges.

B. The FEPA shall take all charges alleging a violation of Title VII, DEA, EPA, or the ADA where the parties have mutual jurisdiction and refer them to the EEOC, so long as the allegations meet the minimum requirements of those Acts.

C. Each Agency will inform individuals of their rights to file charges with the other Agency and or assist any person alleging employment discrimination to draft a charge in a manner which will satisfy the requirements of both agencies to the extent of their common jurisdiction.]

D. For charges that are to be dual-filed, each Agency will use EEOC Charge Form 5 (or alternatively, and employment discrimination charge from which within statutory limitations, is acceptable in form and content to EEOC and the FEPA) to draft charges.

E. Each Agency will make every effort to forward all dual filed charges to the other Agency within two working days of receipt. The Agency which initially takes the charge will provide notice of the charge to the respondent within ten calendar days of receipt. RCHRC will assign a charge number to all charges taken at its office, and follow its procedures for notification of Respondent. Charges taken for RCHRC at the ATDO will reflect the District office number I.E. 110. RCHRC will acknowledge receipt of such charges and indicate on the accompanying forms (EEOC 212-A whether or not it will process any such charges. Such notification will be mailed to EEOC within two working days after receipt of charges so deferred.

F. Each Agency will also forward all other

relevant data obtained at time of intake.

G. Each Agency agrees that it will notify both the Charging Party and Respondent of the dual-filed nature of each such charge it receives for initial processing and explain the rights and responsibilities of the parties under the applicable Federal, State, or Local statutes. **[end ii]**

H. The delegations of authority to receive charges contained in Paragraph II. a. does not include the right of one Agency to determine the jurisdiction of the other Agency over a charge.

## III. DIVISION OF INITIAL CHARGE-PROCESSING RESPONSIBILITIES

In recognition of the statutory authority granted to the FEPA by Section 706 (c) and 706 (d) of Title VII as amended; and by Title I of the Americans with Disabilities Act, and the transmittal of charges of age discrimination pursuant to the Age Discrimination in Employment Act of 1967, the primary responsibility for resolving dual-filed charges between the FEPA and the EEOC will be divided as follows:

A. EEOC will initially process and the FEPA hereby waives its right to initially process:

1. EEOC will initially process and the FEPA hereby waives its right to initially process:

--All Title VII charges received by the FEPA 240 days or more after the date of violation;

--Concurrent Title VII/EPA charges;

--All charges against the FEPA or its parent organization where such parent organization exercises direct or indirect control over the charge decision making process;

--All charges filed by EEOC Commissioners;

--Charges also covered by the Immigration Reform and Control Act;

--Complaints referred to EEOC by the Department of Justice, Office of Federal Contract Compliance, or Federal fund-granting agencies under 29 CFR, 1640, 1641, and 1691 and class complaints retained by these agencies for action;

--Any charge where EEOC is a party to a Conciliation Agreement or a Consent Decree which, upon mutual consultation and agreement, is relevant to the disposition of the charge. The EEOC will notify the FEPA of all Conciliation Agreements and Consent Decrees which have features relevant to the disposition of subsequent

charges; **[end iii]**.

--Any charge alleging retaliation for filling a charge with EEOC or for cooperating with EEOC; and

--All charges against Respondents which are designated for initial processing by the EEOC in a supplementary memorandum to this Agreement.

2. The FEPA will process:

--Any charge alleging retaliation for filing a charge with the FEPA or cooperating with the FEPA;

--Any charge where the FEPA is a party to a Conciliation Agreement or a Consent Decree which, upon mutual conciliation and agreement, is relevant to the disposition of the charge. The FEPA will provide the EEOC with an on-going list of all Conciliation Agreements and Consent Decrees which have features relevant to the disposition of subsequent charges;

--All charges which allege more than one basis of discrimination where at least one basis is not covered by the laws administered by EEOC but is covered by the FEPA Ordinance, or where EEOC is mandated by federal

court decision or by internal administrative EEOC policy to dismiss the charge, but FEPA can process that charge.

--All charges against Respondents which are designated for initial processing by FEPA in a supplementary memorandum to this Agreement; and

--All disability-based charges against Respondent over which EEOC does not have jurisdiction.

B. Notwithstanding any other provision of the Agreement, the FEPA or the EEOC may request to be granted the right to initially process any charge. Such variations shall not be inconsistent with the objective of this Worksharing Agreement or the Contracting Principles. **[end iv]**.

C. Each Agency will on a quarterly basis notify the other of all cases in litigation and will notify each other when a new suit is filed. As charges are received by one Agency against a Respondent on the other Agency's litigation list, a copy of the new charge will be sent to the other Agency's litigation unit withing two working days.

D. EEOC will not defer or refer any charge for the FEPA to process that is not jurisdictional on its face with both Agencies. If it is

apparent that one Agency might have jurisdiction when another doe not, then the Charging Party will be referred to the appropriate Agency.

## IV. EXCHANGE OF INFORMATION

A. Both the FEPA and EEOC shall make available for inspection and copying to appropriate officials fro the other Agency any information which may assist each Agency in carrying out its responsibilities. Such information shall include, but not necessarily be limited to, investigative files, conciliation agreements, staffing information, case management printouts, charge processing documentation, and any other material and data as may be related to the processing of dual-filed charges or administration of the contract. The Agency accepting information agrees to comply with any confidentiality requirements imposed on the agency providing the information. With respect to all information obtained from EEOC, the FEPA agrees to observe the confidentiality provisions of the Title VII, ADEA, EPA, and ADA.

B. In order to expedite the resolution of charges or facilitate the working of this Agreement, either Agency may request or permit personnel of the other Agency to accompany or to observe its personnel when processing a charge.

## V. RESOLUTION OF CHARGES

A. Both agencies will adhere to the procedures set out in EEOC's Order 916, Substantial Weight Review Manual, and the State and Local Handbook. If there are procedural changes at any point during the contract year, the Agencies agree to renegotiate the terms of this section, as appropriate.

B. For the purpose of according substantial weight to the FEPA final finding and order, the FEPA must submit to the **[end v]** EEOC copies of all documents pertinent to substantial weight review; the evaluation will be designed to determine whether the following items have been addressed in a manner sufficient to satisfy EEOC requirements; including, but not limited to:

1. jurisdictional requirements,

2. investigation and resolution of all relevant issues alleging personal harm with appropriate documentation and using proper theory,

3. relief, if appropriate,

4. mechanisms for monitoring and enforcing compliance with all terms of conciliation agreements, orders

After public hearing or consent orders to which the FEPA is a party.

C. In order to be eligible for contract credit and/or payment, submissions must meet all the substantive and administrative requirements as stipulated in the 1994 Contracting Principles.

D. For the purposes of determining eligibility for contract payment, a final action is defined as the point after wich the charging party has no administrative recourse, appeal, or other avenue or redress available under applicable State and Local statutes.

E. As stipulated in the 1994 Contracting Principles, the FEPA will mange its inventory and work process to effect and overall reduction in the age of its dual-filed inventory. In accordance with the requirements of Attachment A of the FY 1994 Contracting Principles, the FEPA will receive credit for accepting charge resolutions which fal within the resolution mis outlined below:

A. CHARGES 270 DAYS OLD OR LESS: 51.2%

B. CHARGES 271 TO 360 DAYS OLD: 25.5%

C. CHARGES 361 TO 540 DAYS OLD: 31.0%

D. CHARGES 541 TO 720 DAYS OLD: 2.4%

E. MORE THAN 720 DAYS OLD: 0%

[end vi]

VI. IMPLEMENTATION OF THE WORKSHARING-

## AGREEMENT

A. Each agency will designate a person as liaison official for the other agency to contact concerning the day-to-day implementation for the Agreement. The liaison for the FEPA will be Frank C. Thomas, Executive Director. The liaison official for the EEOC will [be] Peggy L. Rocker, Deferral Coordinator.

B. The agencies will monitor the allocation of charge-processing responsibilities as is set forth in the Agreement. Where it appears that the overall projection appears inappropriate, the appropriate portion of this Agreement will be modified to ensure full utilization of the investigation and resolution capacities of the FEPA and rapid redress for allegations of unlawful employment discrimination.

C. EEOC will provide original forms to be copied by the FEPA, in accordance with the Regulations and the Compliance Manual to be used by the FEPAs in correspondence with charging Parties and Respondents.

D. If a dispute regarding the implementation or application of this agreement cannot be resolved by the FEPA and District Office Director, the issues will be reduced to writing by both parties and forwarded to the Director of the office of Program Operations for resolution.

E. This agreement shall operate from the first (1st) day of October 1993 to the thirtieth (30th) day of September 1994 and may be renewed or modified by mutual consent of the parties.

I have read the foregoing Worksharing Agreement and I accept and agree to the provisions contained therein.

Date 9/16/93 /s/Chris Roggerson
Name District Director
Equal Employment Opportunity Commission
(Atlanta) District Office

Date 9/14/93 /s/Frank C. Thomas
Name, Director
Richmond County Human Relations Commission
(Full Name of FEPA)
**[end vii]**

[Found as Exhibit B to EEOC Amicus Brief; see also references to pay for this intake see RCHRC Director Thomas Aff. R.1-15- Thomas Aff. Ex. B; Exhibit A to EEOC Amicus Brief]

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## EEOC'S PROPOSED CONTRACTING PRINCIPLES FOR STATE AND LOCAL FAIR EMPLOYMENT PRACTICES AGENCIES FOR FISCAL YEAR 1993

As a basic principle, EEOC will contract with State and, where appropriate, Local Fair Employment Practices Agencies (FEPAs) to process Title VII and ADEA charges received by the EEOC and/or a FEPA. The criteria and parameters established herein are designed to ensure an efficient, effective and coordinated federal-state law enforcement program. The purpose of the contracts is to assist the EEOC in resolving the high volume of Title VII charges and ADEA charges while simultaneously providing support for FEPA charge resolution efforts. The EEOC remains committed to continued improvement of the relationship between the Commission and the Agencies.

EEOC will contract with FEPAs for the satisfactory processing of Title VII charges and ADEA charges. A base amount per acceptable charge resolution is set by EEOC each year based on the amount of Congressional appropriations. In the absence of a reduction in appropriations, this amount shall not be less than $450.00. **[end 1; Ex. B]**.

Nothing in these criteria shall be construed to prohibit EEOC from providing funds to Tribal Employment Rights Offices which carry out enforcement activities.

### I. Criteria for Eligibility

A. In order to be considered eligible to enter into an initial or renewed contract with the EEOC, a FEPA must:

1. Be a designated 706 Agency;
2. Be one of the following (a) a recipient of a contract for the preceding year; or (b) a State FEPA; or (c) a Local FEPA in a jurisdiction where the State FEPA was not under contract for the preceding year, or; (d) a Local FEPA in a jurisdiction in which the State FEPA's current charge inventory is greater than nine months at the FEPA's monthly rate of production.

3. Enter into a worksharing agreement that comports with the principles contained herein and achieves the objectives of the contracting process. The term of the agreement shall run from October 1, 1992 through September 30, 1993 (See Section V); **[end 2]**

Headquarters will conduct on-site evaluations of the investigative an administrative charge processing procedures of contract FEP Agencies. Accordingly, FEPAs are expected to comply with reasonable requests for providing and/or making available information concerning various aspects of their processes and procedures as they relate to or impact on the management and disposition of the dual-filed inventory. Such information includes but is not limited to staffing information, case management printouts, charge processing documentation, and any other material and data as may be related and/or apply to the processing of

dual-filed charges or administration of the contract.

III. **Title VII/ADEA FY 1993 Charge Resolution Contracts**

A. In conjunction with Attachment A, the primary consideration for determining the amount of a contract will be the number of accepted charge resolutions produced by an Agency between July 1, 1991 and June 30, 1992.

1. FEPA contract amounts will be based on

a. $450 per accepted charge resolution for charges closed from July 1, 1991 through June 30, 1992, and **[end 12]**

b. $40 pre accepted charge for performing certain intake services on charges not jurisdictional with the intake agency and which EEOC will process.

2. Similarly, the contract amount for subsequent years will be determined by the number of accepted resolutions produced by an Agency during the period July 1 of the preceding year through June 30 of the year.

B. In order to ensure consistent levels of productivity toward established results, the District Director will review production on a quarterly basis. The FEPA is expected to submit for contract credit approximately one-

fourth of the total accepted resolutions required under the contract each quarter.

1. If the annualized linear projection of the Contract's actual production at the end of the second and third quarters indicates that the Contractor is producing at a rate which would either exceed or not meet the number of charges required under the contract, EEOC may unilaterally modify the contract price and total. **[end 13]**

**REGULAR NOTATION VOTING RECORD**

Date: 07/07/92
Page: 1

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Number: 92-026R — Overall Vote: Approved
Date Circulated: 05/28/92
Office: PROGRAM OPERATIONS — Date Due: 06/03/92
Contact: MICHAEL J. DOUGHERTY, 663-4944
Date Finalized: 07/06/92

| Description | Commissioners' Votes |
|---|---|
| FY 1993 STATE & LOCAL CONTRACTING PRINCIPLES | EK RS JC TG JT<br>01 01 01 01 01 |

/S/Approved (5-0)
7/6/92
**[end 1; Ex. C]**

Supreme Court, U.S.
FILED
AUG 29 1997
CLERK

No. 97-191

In The

# Supreme Court of the United States

October Term, 1996

NANCY PRESCOTT,

*Petitioner,*

*vs.*

G.I.W. INDUSTRIES, INC. and KSB AMERICA COMPANY,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Should the Supreme Court grant certiorari to consider whether the district court, as affirmed *per curiam* by the Eleventh Circuit, properly interpreted the unambiguous language of the Worksharing Agreement proffered into evidence by Petitioner in opposing a summary judgment motion.

2. Should the Supreme Court grant certiorari to review the Eleventh Circuit's determination that the district court did not abuse its discretion in denying Petitioner's motion for reconsideration, which was based on evidence that was available to Petitioner at the summary judgment stage and which evidence was offered to contradict the Worksharing Agreement that Petitioner proffered into evidence and relied on in opposing summary judgment.

3. Whether the Supreme Court should grant certiorari to consider Petitioner's "electronic filing" theory and "equitable tolling" argument even though Petitioner did not present these issues to the district court and the Eleventh Circuit declined to address these issues for the first time on appeal.

## LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties are listed in the caption of this case. The following are parent companies, nonwholly owned subsidiaries, and affiliates of GIW Industries, Inc. or KSB America Company:

KSB AG
Klein Pumpen GmbH
PAB Pumpen-uno-Armaturen-Beteiligungsgesell Schaft GmbH

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## STATEMENT OF THE CASE

### A. Introduction

The dispositive facts and legal principles in this action are not complicated and are well settled. Petitioner, Prescott, commenced this action alleging that GIW Industries, Inc. ("GIW"), her previous employer, discriminated against her because of her gender, female, in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). The decisions of the courts below and the issues on which Prescott now seeks a Writ of Certiorari focus on whether Prescott filed with the Equal Employment Opportunity Commission ("EEOC") a timely charge of discrimination, which is a statutory prerequisite to this Title VII action. The district court entered summary judgment against Prescott on this issue and ordered this action dismissed, and thereafter denied Prescott's motion for reconsideration on the same issue. The Eleventh Circuit affirmed, *per curiam*, the decisions of the district court.

### B. Statement of Facts

GIW, located in Columbia County, Georgia, employed Prescott in August 1976, and Prescott remained employed by GIW in Columbia County, Georgia until she was terminated on March 25, 1994. (R1-1, ¶ 9; R1-11, Prescott Tr. pp. 71-72).[1] In spite of admissions in her deposition to the contrary, Prescott insinuated to the courts below and now in the Petition that she may have been terminated as late as March 28, 1994. (Petition, p. 2). Prescott admits, however, that this alleged dispute is

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1. Prescott's deposition transcript is cited herein as "Prescott" followed by applicable page numbers of the deposition transcript. Cited pages of Prescott's deposition transcript are attached to the Memorandum in Support of Defendant's Motion for Summary Judgment, which is indexed in the district court record as Document R1-13.

immaterial to the timeliness of her charge in this action. (R1-15, Plaintiff's Response to Material Fact No. 6).

Prescott has never been an employee of KSB America Company ("KSB"), and Prescott does not allege any employment relationship with KSB. (Prescott Tr. p. 72). Rather, Prescott's sole basis for naming KSB as a defendant in this action is because of KSB's ownership of stock in GIW. (Prescott Tr. pp. 71-72). Prescott does not dispute that she has never filed a charge of discrimination against KSB. (R1-15, Plaintiff's Response to Material Fact Nos. 11-12).

Plaintiff's written charge of discrimination was filed with the EEOC in its Atlanta District Office and stamped received on September 28, 1994. (R1-15, Plaintiff's Response to Material Fact No. 10; Prescott Tr. P. 217). Accordingly, EEOC received Prescott's charge of discrimination 186 days after her termination date of March 25, 1994. Even if Prescott were able to establish a termination date as late as March 28, 1994, the date she filed her charge with the EEOC would still not be within the 180-day limitations period mandated by Title VII.

In an effort to establish a timely charge, Prescott tried to utilize a charge of discrimination that she allegedly filed with the Richmond County Human Relations Commission ("RCHRC") within 180 days of her termination.[2] RCHRC is a local fair employment practices agency created by the Board of Commissioners of Richmond County, Georgia to administer an ordinance prohibiting certain employment discrimination within the territorial boundaries of Richmond County, Georgia. (Appendix to Petition p. 19). As discussed above, however, Prescott was employed by GIW and was terminated in Columbia County, Georgia and she does not allege in this action any

2. RCHRC is not a deferral agency in this action because Prescott was not employed in Richmond County, Georgia.

employment discrimination arising in Richmond County, Georgia. RCHRC has no jurisdiction over employment practices occurring in Columbia County, Georgia. (Appendix to Petition p. 19; Prescott Brief p. 6; Respondents' Appendix p. 2a; EEOC Amicus Brief p. 4).[3] It is undisputed that Prescott was represented by counsel when her charge was filed. (Prescott Tr. pp. 215-16; R1-15; Plaintiff's Response to Material Fact No. 8). In fact, Prescott's counsel specifically handled the filing of her charge of discrimination. (*Id.*).

1. *The Motion for Summary Judgment*

On January 11, 1996, GIW and KSB filed a timely motion for summary judgment arguing that Prescott's claims were barred by her failure to file with the EEOC a timely charge of discrimination. (R1-10; R1-11). Prescott opposed this motion for summary judgment by proffering a Worksharing Agreement between EEOC and RCHRC in an attempt to establish that RCHRC was EEOC's agent for purposes of receiving her charge of discrimination arising out of Columbia County, Georgia. (R1-14; Appendix to Petition p. 3). Prescott argued that because of this alleged agency relationship, her charge should be deemed filed with EEOC as of the date Prescott's charge was filed with RCHRC. Prescott did not argue to the district court that the Worksharing Agreement she proffered and relied on was in any way ambiguous. Furthermore, in her brief to the Eleventh Circuit, Prescott admitted that "from plaintiff's perspective the language of the agreement was unambiguous . . ." (Prescott Brief, p. 23; Respondents' Appendix p. 3a).

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3. Prescott's brief to the Eleventh Circuit is cited herein as "Prescott Brief" followed by relevant page numbers. Cited pages that are particularly pertinent are included in Respondents' Appendix to this brief in opposition. EEOC's Amicus Brief to the Eleventh Circuit is cited herein as "EEOC Amicus Brief" followed by relevant page numbers.

On March 20, 1996, the district court entered an order granting summary judgment against plaintiff's claims, finding that Prescott's EEOC charge was untimely. (R1-23; Appendix to Petition p. 3). In framing the issue presented by Prescott through introduction of the Worksharing Agreement, the district court stated as follows:

> The central issue presented by plaintiff in this case is a simple question of agency: Does the RCHRC have the authority to accept charges on behalf of the EEOC based upon discriminatory acts occurring outside of Richmond County?

(R1-23; Appendix to Petition p. 3). The court then examined the language of the Worksharing Agreement proferred on this issue by Prescott and concluded as follows:

> By its own terms, the Agreement relied upon by Plaintiff to establish the RCHRC as an agent of the EEOC only contemplates an agency relationship with regard to employment practices occurring within Richmond County, Georgia.

(R1-23; Appendix to Petition p. 4). The district court, therefore, concluded that Prescott failed to offer evidence that she had filed with the EEOC a charge of discrimination prior to September 28, 1994, which is after the 180-day limitations period expired. The district court did not identify or rule on any other issue in granting summary judgment against Prescott. (R1-23; Appendix to Petition pp. 1-4).

2. *The Motion for Reconsideration*

On April 3, 1996, Prescott filed with the district court a motion for reconsideration of the order granting summary judgment.[4] (R1-25).[5] Prescott's Motion for Reconsideration reiterated her agency argument based on the Worksharing Agreement. (R1-25, pp. 2-4). At this stage, however, Prescott attempted to offer affidavits from RCHRC to contradict the language of the agreement introduced by plaintiff and relied on by the district court in granting summary judgment. (R1-25, declarations of John P. Batson, Frank Thomas and Sheryl Jones; Appendix to Petition p. 7). Prescott's Motion for Reconsideration also casually mentions a "due process equal protection" issue, but this issue has not been raised on appeal. (R1-25, p. 4). Prescott's Motion for Reconsideration also makes a brief statement alleging that the EEOC treated Prescott's charge as timely, but Prescott cited no record evidence or legal authority in support of this statement. (R1-25, p. 4-5; Respondents' Appendix pp. 8a). Finally, under the heading of "Even if . . .", Prescott states in a single sentence, with no citation to record evidence or authority, that "her case was logged into the EEOC computer network on September 19, 1994, and given an EEOC number that date." (R1-25, pp. 5-6; Respondents' Appendix pp. 9a-10a). On April 19, 1994, while Prescott's motion for reconsideration was pending, the EEOC, a non-party, attempted

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4. The district court treated Prescott's motion for reconsideration as a motion to alter or amend the order granting summary judgment under Rule 59(e) of the Federal Rules of Civil Procedure. (R1-34; Appendix to Petition p. 5 n.1).

5. Respondents have included Plaintiff's brief in support of her motion for reconsideration in Respondents' Appendix to establish, as argued below, that Prescott did not properly present to the district court matters raised on appeal.

to file an affidavit in this action to contradict the terms of the Worksharing Agreement relied on by Prescott in opposing summary judgment. (R1-30; Appendix to Petition pp. 6-7). Prescott did not file any affidavit from the EEOC at the time she filed her motion for reconsideration.

On May 23, 1996, the district court issued an order denying Prescott's motion for reconsideration. (R1-34; Appendix to Petition pp. 5-8). The district court noted that Prescott's motion for reconsideration was based on "essentially the same" agency argument under the Worksharing Agreement that Prescott argued in opposition to summary judgment. (R1-34; Appendix to Petition p. 7). The district court concluded that the affidavits "belatedly" submitted by Prescott could not be used to "contradict the clear and unambiguous language of the Worksharing Agreement," which Prescott relied on in opposing summary judgment. (R1-34; Appendix to Petition p. 7). The district court, in its discretion, did not identify or rule on any other issues in denying Prescott's motion for reconsideration.

3. *On Appeal to the Eleventh Circuit*

Prescott thereafter appealed the district court's orders to the United States Court of Appeals for the Eleventh Circuit. The EEOC filed an *amicus* brief before the Eleventh Circuit. In addition to the agency issue argued to the district court based on the Worksharing Agreement, Prescott attempted to argue an "electronic transfer" theory and "equitable tolling" in her brief to the Eleventh Circuit. The Eleventh Circuit, however, declined to address these issues raised for the first time on appeal and affirmed, *per curiam* the district court's orders in a two sentence opinion as follows:

> We agree with the district court for the reasons stated in its dispositive orders of March 20 and May 23, 1996, that appellant's

> Title VII claim is barred. In addition, we find no abuse of discretion in the district court's denial of appellant's motion for reconsideration of the court's March 20, 1996, order granting appellee's motion for summary judgment.

(Appendix to Petition p. 9).

## REASONS FOR DENYING THE WRIT

In the Petition, Prescott argues for this Court to grant a writ on three issues: (1) "Worksharing Agreement"; (2) "Electronic Filing"; and (3) "Equitable Tolling." (Petition pp. 11-21).

## I.

## THE COURT SHOULD NOT GRANT A WRIT TO REVIEW THE DISTRICT COURT'S RULINGS ON THE WORKSHARING AGREEMENT.

### A. The Order on Summary Judgment

There is no compelling reason as required by Supreme Court Rule 10 for this Court to review the district court's reading of the language of the Worksharing Agreement at issue in this case. In fact, the terms of the Agreement, which Prescott admits to be unambiguous, establish that RCHRC has no authority to receive charges for the EEOC for alleged employment practices arising outside of Richmond County, Georgia. This Worksharing Agreement, which was introduced and relied on by Prescott, by its own terms, does not extend beyond the territorial boundaries of Richmond County, Georgia.[6] Section 1, Paragraph A of the

6. A copy of the Worksharing Agreement relied on by Prescott is set forth in the Appendix to the Petition beginning on page 39.

Agreement specifically states that the "jurisdiction" of the RCHRC extends only to unlawful employment practices "occurring within Augusta/Richmond County, Georgia." (Appendix to Petition, p. 39). Section 1, Paragraph B of the Agreement specifically limits the scope of the entire Worksharing Agreement "to the extent of the common jurisdiction" of the two agencies. (Appendix to Petition p. 40). Section II, Paragraph B of the Agreement, which pertains specifically to Title VII charges of discrimination, further states that "the [RCHRC] shall take all charges alleging a violation of Title VII . . . where the parties have mutual jurisdiction." (Appendix to Petition p. ). Section 2, Paragraph C of the Agreement further clarifies that the agencies will assist each other with charge filing procedures only "to the extent of their common jurisdiction." (Appendix to Petition p. 41). Accordingly, by its own terms, the Worksharing Agreement introduced by Prescott does not grant any authority to RCHRC with regard to charges of employment discrimination allegedly occurring outside of Richmond County, Georgia. It is important to remember that Prescott did not allege in opposing summary judgment or at the reconsideration stage that the Agreement was ambiguous, and she did not offer any extrinsic evidence to contradict the terms of the Agreement at the summary judgment stage. In fact, Prescott admitted in her brief to the Eleventh Circuit that from her "perspective the language of the Agreement was unambiguous." (Prescott Brief p. 23; Respondents' Appendix p. 3a).

It is well settled under Rule 56 of the Federal Rules of Civil Procedure that summary judgment is mandated when the party opposing the motion "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986). It is equally well-settled that a plaintiff may not maintain a lawsuit claiming discrimination under Title VII unless the plaintiff has

filed a charge of discrimination with the EEOC within 180 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e)(1); (Appendix to Petition p. 13). Prescott tried to establish this essential element by relying entirely upon the Worksharing Agreement that she alleged authorized RCHRC to receive her charge as agent for the EEOC. The language of the Agreement, however, does not establish that RCHRC had any authority either from the EEOC or the Richmond County Government to receive her charge which allegedly arose in Columbia County, Georgia. In fact, the Agreement clearly states several times that the scope of the entire Agreement, including the charge filing provisions, is specifically limited to Richmond County, which is the only location where the jurisdictions of the two agencies overlap. The record establishes, therefore, that the only charge of discrimination Prescott filed with the EEOC is the charge received by the EEOC on September 28, 1994, more than 180 days after Prescott's termination. Accordingly, the district court was correct in granting GIW's and KSB's motion for summary judgment, and there is no reason for this Court to grant a writ to review the district court's order.

**B. The Order on Reconsideration**

There is no compelling need to review the district court's discretionary denial of Prescott's motion for reconsideration. It is well-settled that the decision of a motion for reconsideration is committed to the sound discretion of the district court. *Region 8 Forest Service Timber Purchasers v. Alcock*, 993 F.2d 800, 806 (11th Cir. 1993), *cert denied*, 510 U.S. 1040, 126 L. Ed. 2d 651, 114 S. Ct. 683 (1994); *O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992). After losing on summary judgment, Prescott filed her motion for reconsideration and submitted an affidavit from Frank Thomas, Director of RCHRC; an affidavit of Sheryl Jones, Office Manager at RCHRC; and an affidavit of John R. Batson, Prescott's counsel in this action. (R1-25; Appendix to Petition p. 7). On May 13, 1996, over a month

later, without explanation or argument, Prescott filed an affidavit of Bernice Williams-Kimbrough, District Director of the EEOC in Atlanta, Georgia. (R1-32; Appendix to Petition p. 7). Prescott offered these affidavits to contradict the language of the Agreement relied on by the district court in granting summary judgment.

The district court properly disallowed Prescott from using the above-referenced affidavits to contradict the Worksharing Agreement that she relied on in opposing summary judgment. (R1-34, Appendix to Petition p. 7). It is well settled in the Eleventh Circuit that extrinsic evidence is not admissible to contradict the language of an unambiguous written agreement. *See Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698, 702 (11th Cir. 1993). As previously discussed, Prescott never argued that the Worksharing Agreement was ambiguous, and she admitted in her Brief to the Eleventh Circuit that the Agreement is "unambiguous." In fact, Prescott is the party that introduced the Agreement into the record, thereby adopting and admitting the language of the Agreement. Accordingly, the district court was certainly within its discretion when it disregarded the affidavits submitted at the reconsideration stage to contradict the Worksharing Agreement relied on by Prescott in opposing summary judgment.

Even if the district court had allowed plaintiff to introduce these "belated" affidavits at the reconsideration stage, this evidence, which was previously available to Prescott, could not serve as the basis for granting a motion for reconsideration. *E.g.*, *Morgan v. Harris Trust & Savings Bank of Chicago*, 867 F.2d 1023, 1028 (7th Cir. 1989) (parties failure to present evidence at summary judgment stage "prevented its consideration" on his motion for reconsideration); *Englehard Indus. v. Research Instrumental Corp.*, 324 F.2d 347, 352 (9th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964) (To justify reconsideration based on additional evidence, moving party is "obliged to show not

only that this evidence was newly discovered or unknown to it until after the hearing, but also that it could not have discovered and produced such evidence at the hearing."); *Medley v. Westpoint Stevens, Inc.*, 162 F.R.D. 697, 699 (M.D. Ala. 1995) ("Where a party attempts to introduce previously unsubmitted evidence on a motion to reconsider, the court should not grant the motion absent some showing that the evidence was not available during the pendency of the motion."); *Prieto v. Storer Communications, Inc.*, 152 F.R.D. 654, 655 (M.D. Fla. 1994) ("Evidence which was available to a party during the pendency of a motion for summary judgment may not later be introduced on a motion to reconsider."); *LoSacco v. City of Middletown*, 822 F. Supp. 870, 877 (D. Conn. 1993), *aff'd*, 33 F.3d 50 (2d Cir. 1994) ("A motion for reconsideration cannot be employed as a vehicle for asserting new arguments or for introducing new evidence that could have been adduced during the pendency of the summary judgment motion.").

There is no evidence that the information contained in these affidavits was not previously available to Prescott.[7] To the contrary, the record establishes that this information was available to Prescott prior to the time she opposed the summary judgment motion. In fact, Prescott used an affidavit from Mr. Thomas in opposing summary judgment in this action. (R1-15, Declaration of Frank Thomas). The affidavit of Sheryl Jones states that she has been with RCHRC since 1984. (R1-25, Declaration of Sheryl Jones, ¶ 2). Ms. Williams-Kimbrough's affidavit states that she has been District Director for the EEOC since 1990. (R1-32, Appendix to Petition p. 20). Finally, the affidavit of Mr. Batson, Plaintiff's counsel, did not refer to any newly available evidence. (R1-25, Declaration of John P.

7. Prescott insinuates in the Petition that she was somehow surprised by defendant's arguments pertaining to the limited scope of the Worksharing Agreement. (Petition p. 7). Plaintiff, however, cannot claim to be surprised by the plain language of a document she proffered into evidence.

Batson). Accordingly, the record establishes that the information contained in the affidavits submitted for reconsideration was available at the time the summary judgment motion was pending. This information, therefore, cannot serve as the basis of a motion for reconsideration, which compels the conclusion that the district court did not abuse its discretion in disregarding these affidavits and denying Prescott's motion for reconsideration. This Court, therefore, should not grant a writ to review district court's denial of Prescott's motion for reconsideration.

**C. The Decisions Below Relating to the Worksharing Agreement do Not Conflict With Prior Decisions of This Court.**

Prescott alleges in the petition that the decisions of the district court regarding the Workshare Agreement somehow conflict with the decision in *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982). (Petition p. 11). In *Zipes*, this Court held that a timely EEOC charge was not a jurisdictional prerequisite to bringing a Title VII case in federal court, but is to be construed as a statute of limitations. *Zipes*, 455 U.S. at 393. This case was correctly cited by the district court. (R1-23; Appendix to Petition p. 2). There is no issue in this case with regard to federal court jurisdiction over Title VII actions. To the contrary, the only discussion of jurisdiction in this case relates to the jurisdiction of the RCHRC, and this discussion was necessary for the district court to determine the scope of the Worksharing Agreement relied on by Prescott. There is no support in the *Zipes* decision for Prescott's apparent argument that RCHRC can act beyond its geographic jurisdiction to receive charges. It is axiomatic that RCHRC cannot, by definition, effectively perform any act beyond its jurisdiction, and the Agreement introduced by Prescott established, by its own terms, that this jurisdiction is confined to Richmond County, Georgia.[8]

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8. In the Petition, Prescott tries to make a hair-splitting distinction (Cont'd)

Prescott also insinuates that the district court was obligated to defer to the EEOC's interpretation of the Worksharing Agreement under the authority of *Smiley v. Citibank*, __ U.S. __, 116 S. Ct. 1730, 1733, 135 L. Ed. 2d 25 (1996). *Smiley* states the well settled principle that this Court will "defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in *statutes* they are charged with administering." 135 L. Ed. 2d at 30. (Emphasis added). In the context of this case, this principle would support deference to the EEOC in construing ambiguous provisions of Title VII. *See EEOC v. Commercial Office Products*, 486 U.S. 107, 115, 100 L. Ed. 2d 96, 106-07, 108 S. Ct. 1666 (1988). This action, however, does not involve the construction of any allegedly ambiguous term in Title VII. To the contrary, this case turns on the language in the Worksharing Agreement, and there is no indication in the cited cases that this Court should defer to EEOC's construction of a contract. In fact, the *Petrelle* decision relied on by Prescott in the Petition specifically holds that the EEOC is not entitled to deference in construing a Worksharing Agreement. *Petrelle v. Weirton Steel Corp.*, 953 F.2d 148, 153 (4th Cir. 1991) (In refusing to defer to agency construction of a worksharing agreement, the Fourth Circuit noted, as is true in Prescott's case, that "this case does not ask what the statute allows, but rather what the worksharing agreement succeeds in doing."). In any event, Prescott admits that the agreement is not ambiguous, which would foreclose any issue of deference even if otherwise applicable. Accordingly, there is no conflict with *Smiley* or any other case cited by plaintiff on the issue of deference.

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(Cont'd)
between RCHRC's authority to receive charges and its authority regarding "substantive matters relating to jurisdiction." (Petition p. 3). This argument misses the fundamental point that RCHRC has no authority to act in any capacity beyond the territorial boundaries of Richmond County, Georgia. The Worksharing Agreement relied on by Prescott simply recognizes and incorporates this fundamental limitation on RCHRC's power.

Prescott insinuates on page 13 that the district court's reading of the Worksharing Agreement in this action, as affirmed by the Eleventh Circuit, creates a conflict among United States courts of appeal. This is not true. The cases cited by Prescott construing other worksharing agreements between other agencies and the EEOC all involve charges over which both agencies had jurisdiction. *See Ford v. Bernard Fineson*, 81 F.3d 304 (2d Cir. 1996) (Involved New York State Division of Human Rights and charge arose in New York); *EEOC v. Superior Temporary Services, Inc.*, 56 F.3d 441 (2d Cir. 1996) (Involved New York State Division of Human Rights and charge arose in New York); *Petrelle v. Weirton Steel Corp.*, 953 F.2d 148 (4th Cir. 1991) (Involved West Virginia Human Rights Commission and charge arose in West Virginia); *Griffin v. City of Dallas*, 26 F.3d 610 (5th Cir. 1994) (Involved Texas Commission on Human Rights and charge arose in Texas); *Marlowe v. Bottacelli*, 938 F.2d 807 (7th Cir. 1991) (Involved Illinois Department of Human Rights and charge arose in Illinois); *Sofferin v. American Airlines*, 923 F.2d 552 (7th Cir. 1991) (Involved Illinois Department of Human Rights and charge arose in Illinois); *Hong v. Children's Memorial Hospital*, 936 F.2d 967 (7th Cir. 1991) (Involved Illinois Department of Human Rights and charge arose in Illinois); *Worthington v. Union Pacific*, 948 F.2d 477 (8th Cir. 1991) (Involved Nebraska Equal Opportunity Commission and charge arose in Nebraska); *Reynolds Metal Co. v. Rumsfield*, 564 F.2d 663 (4th Cir. 1977) (Involved agreement between OFCCP and EEOC, both of which have nationwide jurisdiction). None of these cases involve a charge arising outside of the geographic territory that an agency is authorized to regulate, and none of these cases otherwise indicate than an agency can accept charges of discrimination arising outside of its jurisdiction. These cases, therefore, are inapposite to the issue of whether RCHRC had the authority to receive charges of discrimination arising in Columbia County, Georgia.

Finally, Prescott argues that the district court's decision regarding the particular Worksharing Agreement at issue in this case will have a widespread, devastating impact on all EEOC worksharing agreements. To the contrary, the EEOC drafted this Agreement, including the language limiting the scope of the Agreement to Richmond County, Georgia, and the EEOC and RCHRC can change the Agreement at any time. The fundamental problem, however, with Prescott's argument on this issue is that there is no indication from the ordinance creating the RCHRC that it could agree to accept charges outside of Richmond County even if it wanted to. Even the few extracted sections of the ordinance cited in the Appendix to the Petition make clear that the "Board of Commissioners of *Richmond County*" created the "Human Relations Commission *for the County of Richmond*" and gave it power only to "Investigate and study complaints, problems and specific situations arising . . . *in the County* . . . ." (Appendix p. 19) (Emphasis added). As previously discussed, the EEOC and RCHRC explicitly recognized and adopted this fundamental territorial limitation on the authority of RCHRC in the unambiguous language of the Worksharing Agreement at issue in this case.

The facts presented to the district court, therefore, establish that the district court was correct in finding that the RCHRC had no authority to receive charges on behalf of the EEOC beyond the territorial boundaries of Richmond County, Georgia, and the district court did not abuse its discretion in denying Prescott's motion for reconsideration. These decisions were properly affirmed by the Eleventh Circuit. In addition, Prescott has presented no basis for this Court to review these decisions, and the writ should be denied as to Prescott's "Worksharing Agreement" issue.

## II.

## THE COURT SHOULD NOT GRANT A WRIT ON PRESCOTT'S ELECTRONIC FILING ISSUE.

### A. Prescott Did Not Properly Present This Electronic Filing Issue to the Trial Court and the Eleventh Circuit Declined, in Its Discretion, to Consider This Issue for the First Time on Appeal.

It is undisputed that Prescott did not argue or even mention her theory of "electronic filing" to the district court during the summary judgment stage in this action. Electronic filing is not mentioned in Prescott's Brief in Opposition to Summary Judgment. (R1-14). Rather, Prescott alleged in her Eleventh Circuit brief that the materials submitted with her Motion for Reconsideration "addressed the electronic filing issue." (Brief of Appellant, p. 5). Prescott now tries to obfuscate this admission by stating in the Petition that, at the reconsideration stage, she "submitted further evidence to expand on the EEOC computer based filing." (Petition p. 8). Prescott, however, does not allege in the Petition to have addressed electronic filing in opposing summary judgment before the district court, and she does not and cannot cite any record evidence on this point. (Petition p. 6-8).

While Prescott does allege to have presented the electronic filing issue to the district court at the reconsideration stage, the record establishes that she did not mention or otherwise discuss "electronic filing" in her Brief in Support of Motion for Reconsideration. (R1-25; Respondents' Appendix pp. 5a-10a). The only sentence contained in Prescott's Brief in Support of Motion for Reconsideration that could even remotely be construed to address electronic filing is the one sentence under the heading of "Even if . . .", which states as follows: "Even if

the HRC is not an agent, the new evidence shows that the case was logged into the EEOC computer network on September 19, 1994, and given an EEOC number that day." (Respondents' Appendix p. 9a-10a). Prescott did not cite or discuss any record evidence to support this statement. More importantly, Prescott did not cite a single legal authority to the district court that this statement, even if true, would establish that a "charge" of discrimination, as required by Title VII and applicable regulations, had been filed with the EEOC. *See First Alabama Bank v. First State Ins. Co., Inc.*, 899 F.2d 1045, 1060 n. 8 (11th Cir. 1990) ("passing reference" in brief not sufficient to preserve an argument for appeal). Prescott was obligated to fairly articulate and press this argument to the district court to preserve this issue for review, and she failed to do so. The district court is not obligated to sift through the entire record on reconsideration to identify and rule on arguments that may have been available but were not made in Prescott's Motion for Reconsideration. *Restigourhe, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1213 n.5 (11th Cir. 1995) (party cannot rely on court to "distill every argument that could be made based on the materials before it . . ."). Accordingly, Prescott's electronic filing argument was not properly presented to the district court and it was certainly not an abuse of the district court's discretion, at the reconsideration stage, to decline to address this unarticulated issue.

Likewise, the Eleventh Circuit did not abuse its discretion in declining to address for the first time on appeal Prescott's electronic filing theory. The Eleventh Circuit follows the general rule that it will not consider on appeal arguments that were not properly presented to the district court. *See Depree v. Thomas*, 946 F.2d 784, 793 (11th Cir. 1991) ("We have long held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court."). Only in demonstrated exceptional circumstances will the Eleventh

Circuit exercise its discretion to depart from this general rule. *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360-61 (11th Cir. 1984). Prescott does not challenge this principle in the Petition. Accordingly, the Eleventh Circuit was well within its discretion to affirm the district court's discretionary order denying reconsideration without addressing this issue that was not properly presented to or otherwise ruled on by the district court.

**B. Prescott's Electronic Filing Theory is Meritless.**

Even if this Court were to consider, *sua sponte*, Prescott's electronic filing argument, this theory is meritless as a matter of law. Prescott alleges that she filed her charge of discrimination with RCHRC, and an RCHRC employee entered a charge reference number into an EEOC computer network (Petition p. 18). The EEOC, in its amicus brief, refers to this procedure as "electronic transmittal." (EEOC Amicus Brief, p. 20). The EEOC admits, however, that the transfer to the EEOC of Ms. Prescott's charge of discrimination was not complete "until after the statute of limitations had expired," which is when the EEOC received Prescott's "paper charge" on September 28, 1994. (EEOC Amicus Brief, pp. 4-5, 20).

Prescott and the EEOC have not and cannot cite any legal authority supporting their argument that the mere entry of a number in an EEOC computer network constitutes filing a charge of discrimination with the EEOC as required by Title VII and applicable regulations. To the contrary, Title VII specifically mandates that "charges shall be in writing . . . and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b); (Appendix to Petition p. 12). In keeping with this statutory mandate, EEOC regulations explicitly confirm that "a charge shall be in writing." 29 C.F.R. § 1601.9; (Appendix to Petition p. 14). EEOC regulations further

state that a charge of discrimination should contain, among other things, the full name and address of the charging party and employer and a statement of facts pertaining to the alleged discrimination. 29 C.F.R. § 1601.12; (Appendix to Petition pp. 14-15). Furthermore, the EEOC regulations specifically provide that a charge of discrimination may only be "made in person or by mail." 29 C.F.R. § 1601.8. In fact, Prescott admits in the Petition that "there is no suggestion that the paper charge can be eliminated, as the statute would seem to prohibit it." (Petition p. 18). Accordingly, both the statutory mandate of Title VII and EEOC regulations would preclude Prescott's electronic filing theory even if it had been properly presented to the district court.

**C. Prescott Has Not Stated Any Valid Reason to Justify a Writ on the Electronic Filing Issue.**

Prescott argues in the Petition that "if the state and local agencies cannot be mutual agents by the language of the Workshare Agreements, then this issue of first impression takes on importance or (sic) monumental proportions." (Petition p. 17). This argument indicates a fundamental misunderstanding of the district court's orders. There is no ruling in this case that state and local agencies cannot be agents for the EEOC under worksharing agreements. The district court simply held that the agency relationship created by the plain language of the Agreement at issue in this case did not extend to Prescott's charge arising out of Columbia County, Georgia. The district court did not disturb the effectiveness of the Agreement within its expressly defined scope of Richmond County, Georgia. Instead of disturbing the Agreement, as suggested by Prescott, the district court simply applied the Agreement according to its unambiguous language.

In a final effort to attach "great importance" to this issue, Prescott states that "one could argue that the district court and

the Eleventh Circuit rejected the use of computerized information." (Petition p. 20). Of course, this argument is fundamentally inconsistent with Prescott's underlying argument that the district court erred because "the Order did not address the electronic filing issue." (Petition p. 10). In any event, as acknowledged by Prescott, it is the words of Congress in Title VII that require all charges filed with the EEOC to be "in writing" and EEOC regulations mandate what this written charge must contain. Even the EEOC admits, as it must, that the filing of Prescott's charge was not complete until the EEOC received her written charge on September 28, 1995. (EEOC Amicus Brief p. 4-5). Prescott, with the assistance of counsel, had 180 days to satisfy these requirements, and she failed to do so.

In summary, it is undisputed that Prescott did not address electronic filing in opposing summary judgment. Furthermore, Prescott did not properly present this issue at the reconsideration stage and the district court did not abuse its discretion by not ruling on this issue. Likewise, the Eleventh Circuit did not abuse its discretion by not considering this issue for the first time on appeal. Furthermore, Prescott's arguments regarding the "great importance" of this issue are meritless and unsupported by the record. Accordingly, this Court should decline to issue a writ on the electronic filing issue.

## III.

## THIS COURT SHOULD NOT GRANT A WRIT ON PRESCOTT'S EQUITABLE TOLLING ARGUMENT.

### A. Prescott Did Not Argue or Otherwise Present Equitable Tolling to the District Court.

Prescott and the EEOC attempted to argue equitable tolling for the first time on appeal before the Eleventh Circuit. Prescott,

however, does not and cannot give any record citations when Prescott presented and argued this issue to the district court at the summary judgment stage or at the reconsideration stage. In fact, Prescott's Brief in Opposition to Summary Judgment and Brief in Support of Motion for Reconsideration do not make a single reference to equitable tolling. (R1-14; R1-25). GIW and KSB cited controlling authority in its Reply to Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment specifically foreclosing any chance for an equitable tolling argument in this action, and Prescott still declined to raise and address this issue in her subsequent Motion for Reconsideration. (R1-19, pp. 5-6). Accordingly, the record in this action establishes that Prescott did not present the issue of equitable tolling to the district court.

While Prescott declines, as she must, to directly state in the Petition that she argued equitable tolling to the district court, she does insinuate that the issue was raised by her mere citation of two cases to the district court. (Petition pp. 22-23). First, plaintiff says she cited *Williams v. Washington Metro Area Transit Authority*, 721 F.2d 1412 (D.C. Cir. 1983) in her brief in opposition to summary judgment. Prescott cited this case, however, in her agency argument based on the Worksharing Agreement. Plaintiff's discussion of this case did not mention equitable tolling in any way. (R1-14; Respondents' Appendix p. 12a-13a). Prescott also alleges that she brought up equitable tolling at the reconsideration stage by citing *Brown v. Crowe*, 963 F.2d 895, 900 (6th Cir. 1992). Again, however, Prescott's citation and discussion of this case related entirely to her agency argument, and she did not mention equitable tolling in any way. (R1-25; Respondents' Appendix p. 7a). Accordingly, Prescott has not and cannot give a single citation to the record in this action, much less to her Appendix to the Petition, where equitable tolling was mentioned in any way to the district court. If, as argued in the Petition, "Plaintiff's arguments directly

confronted the need for tolling" and that this case "cried out" for this theory, it is certainly reasonable to conclude that Plaintiff's counsel consciously decided not to argue or even mention this theory to the district court. Clearly, therefore, there was no error or abuse of discretion by the district court by not ruling on this unpresented matter, and the Eleventh Circuit did not abuse its discretion by not addressing this issue for the first time on appeal.

**B. Prescott's Equitable Tolling Argument is Meritless.**

Even if Prescott had properly raised this issue, the record establishes that equitable tolling would not apply. It is undisputed that Prescott was represented by counsel before the expiration of the 180-day deadline for filing her charge of discrimination, and her counsel specifically handled the filing of her charge of discrimination with RCHRC. (Prescott Tr. pp. 215-16; R1-15, Plaintiff's Response to Material Fact ¶ 7-8). Equitable tolling does not apply to filing a charge of discrimination when the charging party is represented by counsel. *Edwards v. Kaiser Aluminum and Chemical Sales*, 515 F.2d 1195, 1200 n. 8 (5th Cir. 1975) (equitable tolling "singularly inappropriate" where plaintiff retained counsel "long before 180-day period ran"); *Freeman v. CSX Transportation*, 730 F. Supp. 1084, 1086-87 (M.D. Ala. 1989) ("equitable tolling is particularly inappropriate when Plaintiff has consulted counsel during the statutory period"). Accordingly, the record establishes that equitable tolling cannot apply in this case.

**C. Prescott Has Not Stated Any Valid Reason to Justify a Writ on the Equitable Tolling Issue.**

Prescott does not allege any split among the circuits on this issue, and, contrary to Prescott's argument, this principle is not in conflict with this Court's decision in *Zipes v. Trans World*

*Airlines*, 455 U.S. 385 (1991). In fact, the fundamental principle recognized by this Court as the reason for equitable tolling in the Title VII context is to assist "laymen, unassisted by trained lawyers". . . . *Zipes*, 455 U.S. at 397 (citing *Love v. Pullman*, 404 U.S. 522, 527 (1972).

The EEOC's brief to the Eleventh Circuit, which is adopted by Prescott, cited cases discussing equitable tolling in situations where the EEOC made an administrative error. (EEOC Amicus Brief p. 19). The EEOC's discussion of this issue, however, contained no citations to the record in this action, and there is no record evidence that the EEOC or any other agency made any error affecting the timely filing of Prescott's charge. Prescott's counsel filed her charge of discrimination with the wrong agency, and the EEOC did not receive Prescott's charge until after the statute of limitations ran. (EEOC Amicus Brief p. 20). As discussed above, equitable tolling cannot apply to cure this defect because Prescott was represented by counsel who specifically handled the filing of her charge of discrimination.

Accordingly, the district court did not err or abuse its discretion in any way by failing to address equitable tolling at either the summary judgment stage or at the reconsideration stage because this issue was not presented by Prescott and is patently meritless. The Eleventh Circuit did not abuse its discretion in refusing to consider this issue for the first time on appeal. Prescott has not identified any reason for this Court to issue a Writ on this issue and the Petition should be denied.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

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## APPENDIX A — EXCERPTS FROM BRIEF OF APPELLANT NANCY PRESCOTT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELEVENTH CIRCUIT NO.
96-8545

NANCY PRESCOTT,

Plaintiff-Appellant,

v.

G.I.W. INDUSTRIES, INC., and KSB AMERICA COMPANY,

Defendants-Appellees.

BRIEF OF APPELLANT

On Appeal from United States District Court
for the Southern District of Georgia
Civil Action No CV195-44

* * *

[5] the District Court abused its discretion in not considering the evidence Plaintiff submitted. The District Court denied the reconsideration, saying it was simply the same argument. Plaintiff asserts the evidence submitted in the reconsideration supplemented prior apparent agency evidence and addressed the electronic filing issue.

During the pending reconsideration, the EEOC filed for

leave to file an affidavit by Bernice Williams Kimbrough. (R1-29). The affidavit of Bernice Williams Kimbrough shows that at ¶17, from the records of the RCHRC and EEOC, the date the RCHRC electronically notified the EEOC that it was administratively transferring the file to the ATDO was 9/19/94. At ¶18 of the Kimbrough Affidavit it shows in the last column that the ATDO notified the RCHRC on September 23, 1994 that the ATDO was in electronic receipt of the charge. (R.1-30-¶18). The record reflects that the EEOC paid $50.00 to the RCHRC and that the EEOC treated charge 11A-94-098 as timely filed. (R.1-30). By inference, the manner in which it was processed, both agencies believed the charge was timely, if not, then the agency has to act accordingly. There is no evidence to show that the agencies did not believe the charges were timely filed. On May 23, 1996 the District Court denied the reconsideration. (R.1-34). Notices of appeal were filed on April 19, 1996 (R.1-28) and May 24, 1996 (R.1-35).

## Statement of Facts

This is an appeal from the grant of summary judgment to the [6] defendant employer, GIW Industries ("GIW"), in a Title VII case. GIW argued, and the district court agreed, that the plaintiff, Nancy Prescott, had not filed a timely charge. According to Defendants, Prescott filed her charge 174 days after her termination, but she filed with the Richmond County Human Relations Commission ("RCHRC"), a local FEP agency that did not have geographic jurisdiction to investigate, have a hearing and actively otherwise reconcile her charge because the termination occurred at an employer in a different county. There is no local or state FEP agency with active jurisdiction over claims arising in the County of Prescott's former employer, the defendant.

*Appendix A*

No direct attack was made on the agency theory, vis a vis the worksharing agreement, until Defendants response brief. It was however done by argument in a footnote in the opening brief.

No agency evidence was submitted to contradict the evidence from plaintiff, from which it could be inferred that the agencies treated the charge as timely.

In accordance with the worksharing agreement between the RCHRC and the EEOC, the RCHRC received the filing on 9/15/94, 174 days after termination. The RCHRC transmitted Prescott's charge to the EEOC on 9/19/94 (R.1-25-Jones ¶13; R.1-30). The charge was received electronically at the EEOC's headquarters in Washington, D.C. on the 178th day after Prescott's termination (R.1-30-¶17; Ex. A; Brief of EEOC), and subsequently transmitted to the Atlanta District Office on the 182nd day (R.1-30-¶18). (Brief of EEOC).

* * *

[23] (11th Cir. 1990).

The unrebutted inferences from the record about the nature of the longstanding relationship, whereby the EEOC and the RCHRC acted as agents for one another for accepting filings cannot be disregarded because of language the District Court found conflicting in the agreement.

From Plaintiff's perspective the language of the Agreement was unambiguous, that the agency relationship was created. Language about jurisdiction relates more to substance as to investigation, and ought not be an impediment to a clear

statement of an agency relationship, and an otherwise efficient system to begin the processing of charges for substance, as it relates to determinations of timely filings.

(2) Whether the electronic transfer of a charge from an FEP agency to the EEOC constitutes filing of a charge with the EEOC, thereby making the charge at issue timely filed?

Plaintiff adopts the arguments of the EEOC on this matter.

When the Defendants filed their motion for summary judgment they did not assert that an electronic filing was not timely. (Defendants Statement of Material Facts; R.1-12). The sole fact upon which they based their defense was that the EEOC did not stamp received on the copy the EEOC was sent until after the running of the 180 days.

The Plaintiff submitted evidence as part of the reconsideration from which it was shown that the HRC entered or filed the charge into the EEOC system on 9/19/94. (R.1-25-Thomas . . .

* * *

## APPENDIX B — BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CIVIL ACTION NO.
CV195-044

NANCY PRESCOTT,

Plaintiff,

v.

G.I.W. INDUSTRIES, INC., and KSB AMERICA COMPANY,

Defendants.

### BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

The Defendants were the movants in a motion for summary judgment. It was their burden to show, as a matter of undisputed material fact, that Plaintiff could not show any theory or facts which would make the filing timely, under appropriate law, in light of the rule that all inferences and evidence was to be viewed in the light most favorable to the Plaintiff.

The burden on the Defendants was to negate, that is to show, that it was not possible that an agency relationship existed, explicitly or implicitly, for the acceptance of filings by the RCHRC. More directly, the Defendants has to show that an agency relationship for receiving filings indisputably could not

exist. Yes, the RCHRC can only investigate and attempt to concilliate disputes where the employer is within Richmond County. However, the Workshare Agreement refers not just to the jurisdiction of conciliating or investigating charges, but to the filing of charges. As is discussed below neither the EEOC nor the HRC have the discretion, or jurisdiction, to reject the filing of a charge. To that extent, the fact that the Workshare agreement deals with jurisdiction on substantive concilliation does not indisputably show that the Workshare Agreement does not grant a reciprocal agency relationship as to filings.

Agnecy [sic]

Standard agency law alone, without the remedial reading of Title VII required by Supreme Court jurisprudence, compels a reading of the Workshare Agreement, that notwithstanding the language used by the Court, the Agreement also has a reciprocal appointment for filings.

The capacity to be a principal depends on whether the act to be done by the agent is within the capacity of the principal if he were present. § 28 Agency CJS. A corporation may serve as agent for another corporation. *United Bonding Ins. Co. v. Banco Luizo-Pamameno,* S.A., 422 F.2d 1142 (5th Cir. ). A basic rule of agency is that whatever a person may do himself, he may do through an agent. Likewise, a person capable of acting for himself may act as an agent fore another, but a person may act as agent for others although he is incapable of acting for himself. *Sims v. Slovin,* 207 A.2d 597, 603, aff'd, Sup. 213 A.2d 903. The creation of the relation of principal and agent rests in the intention of the parties which may be express or implied and need not be a conscious intention, but may be determined from the facts and circumstances or a particular case. § 38 Agency.

*Appendix B*

One acting by another is acting for himself. § 4(b) Agency. In an agency relationship the principal is the party for whom another acts and from whom he derives his authority to act.

There is no rule of construction which prohibits an interpretation of the Workshare Agreement consistent with the reciprocal appointment for filing notwithstanding the limitations on jurisdiction for concilliation.

The declarations originally submitted by Frank Thomas and Louise Dirrette show that filings were accepted by the RCHRC as a matter of course. Submitted herein are declarations that the RCHRC has for over a decade been an agent of the EEOC for preparing and accepting charges for filing, and that in fact, the EEOC pays them to act as their agent, in such cases where the employer is located outside Richmond County. The Declaration of Sheryl Jones show that in 1994 the RCHRC was a agent for the EEOC and the RCHRC had an EEOC computer as a part of the EEOC computer network for logging in cases in the EEOC system including those where the employer is outside Richmond County. The Declarations submitted herein reflect that the RCHRC has been holding itself out to the public as an agent for the EEOC for the purpose of timely filing of complaints, even in cases where the employer is located outside Richmond County. *Brown v. Crow*, 963 F.2d 895, 900 (6th Cir. 1992) (deferral agency mistake in applying Workshare Agreement not held against claimant).

In its order, the Court relied exclusively on the interpretation of the Agreement. Because this was a motion for summary judgment, the only way the Defendants could have won, using the Court's analysis, was if the Workshare Agreement and the Richmond County Ordinance creating the RCHRC precluded

the RHRC from being in the business of accepting charges where the employer is in another County. There was nothing in this record, which when construed in the light most favorable to the Plaintiff and consistent with agency principles and the rules of construction of filing timeliness by the Supreme Court, which precluded RCHRC from being an agent of the EEOC for the purpose of receiving filings in cases of possible discrimination where the employer is located outside Richmond County. While it is true that the 1981 ordinance creating the RCHRC limits its "investigatory" powers to Richmond County (Section 14(i)), the RCHRC can "(j) Receive, initiate, investigate and pass upon complaints alleging discrimination in employment . . . because of . . . sex . . . or age." (Section 14(j).

Due Process Equal Protection
Requires Participation of EEOC

The EEOC was created by Congress to resolve disputes relating to discrimination. The EEOC has a vested interest in this case and should be allowed to participate, and should be notified of the need to participate.

Undisputed Evidence of
Timely Filing

The EEOC considered the charge timely filed. On the "Notice of Right to Sue". The EEOC did not indicate that the complaint was not timely filed. The question of whether a complaint is timely filed, on acceptance, is first determined by the EEOC. The EEOC must make a determination of whether a charge is timely filed so it does not waste what little resources it has. If the charge were not timely filed another type of Notice of Right to Sue would have, or should have, been provided.

*Appendix B*

Neither Agency has the Jurisdiction or
Discretion Not to Accept Filings

There is a major distinction between the jurisdiction to "accept" filings and the jurisdiction to do the processes of investigation and reconciliation.

To the extent of their "common jurisdiction" each may investigation and try to conciliate employment problems where the employers are within Richmond County.

However, the EEOC has no discretion not to accept any filing made with it.

To that extent, when the RCHRC acts as an agent of the EEOC, in matters of accepting filings it is without discretion to reject or not accept a filing.

It is like Court, which must accept the filing.

Note in paragraph II.B., the RCHRC is to refer charges to the EEOC, "so long as the allegations meet the minimum requirements of those Acts."

Other terms of the Workshare Agreement require the HRC to send documents to the EEOC within two days.

The Defendants have not shown that the HRC informed the Plaintiff that the HRC was not the right place to file.

Even If . . .

Even if the HRC is not an agent, the new evidence shows

that the case was logged into the EEOC computer network on September 19, 1994, and given an EEOC number that day.

Respectfully submitted this 3rd day of April, 1996.

s/ John P. Batson
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## APPENDIX C — EXCERPTS FROM PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

Civ. Act. No.
195-044

NANCY PRESCOTT,

Plaintiff,

v.

G.I.W. INDUSTRIES, INC., and KSB AMERICA COMPANY,

Defendants.

PLAINTIFFS' BRIEF
IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The defendants raise administrative law principles to assert the complaint should be dismissed, alleging the administrative EEOC charge was not timely filed with an appropriate agency (Issue I), and that although GIW was named in the administrative complaint, because KSB was not also named, KSB should be dismissed. (Issue II).

*Appendix C*

## PLAINTIFF TIMELY FILED A CHARGE OF GENDER DISCRIMINATION

Plaintiff alleged she was terminated on March 25 or 28, 1994, depending upon whether one uses the date she knew, or the company knew. Assuming the earlier date, then if Georgia is a deferral "state", then Plaintiff had to file her complaint within 300 days with the EEOC, or within 180 days (or September 22, 1994), if Georgia is a nondefferal state.

The defendants have taken the position that because the Richmond County Human Relations Commission has no jurisdiction to investigate claims in Columbia County that this makes the "state" [2] a nondeferral state. This is not necessarily so, but as is shown by the discussion below, does not matter at this point.

Even assuming that Georgia is a non-deferral state, the complaint was timely filed, because it was filed on September 15, 1994, with the Richmond County Human Relations Commission, (hereafter HRC) because a Worksharing Agreement between the EEOC and the HRC makes one the agent of the other for purposes of accepting filed charges. The HRC is a Section 706 "Notice Agency" with a workshare agreement with the EEOC. 29 C.F.R. § 1601.74. Workshare agreements between the EEOC and state deferral agencies usually provide that a filing with the EEOC or state fair employment agency is a filing with the other agency. Courts have upheld these agreements where the local agency and the EEOC have a contract or agreement. See e.g., *Williams v. Washington Metro. Area Transit Auth.*, 721 F.2d 1412 (D.C. Cir. 1983) (with a workshare agreement, a filing with the deferral agency constitutes a filing with the EEOC even if it was never forwarded to the EEOC

because the state agency is an apparent agent of the EEOC). If the EEOC were not able to contract with local agencies to accept filing the purpose of the EEOC would be stiffled unless the EEOC were wastefully huge and had branches of its agency in every geographic region around the country.

The 1994 Worksharing Agreement between the HRC and EEOC is attached to the Declaration of Frank Thomas the Director of the HRC. Exhibit A. The HRC-EEOC Worksharing Agreement for Fiscal Year 1994 (which runs from October 1, 1993 through September . . .

* * *